88-1194

No.

Supreme Court, U.S.
FILED
JAN 12 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

ICELEAN CLARK, *et al.*,
Petitioners,

vs.

KALIMA JENKINS, *et al.*,
Respondents,

vs.

THE STATE OF MISSOURI, *et al.*,

and

SCHOOL DISTRICT OF KANSAS CITY, MISSOURI, *et al.*,
Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MARK J. BREDEMEIER*
JERALD L. HILL
LANDMARK LEGAL FOUNDATION
15th Floor
1006 Grand Avenue
Kansas City, Missouri 64106
(816) 474-6600
Attorneys for Petitioners

**Counsel of Record*

January 11, 1989

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

TABLE OF APPENDICES

August 19, 1988 Opinion of the United States Court of Appeals for the Eighth Circuit A1

October 24, 1988 Amended Order of the United States Court of Appeals for the Eighth Circuit A53

September 15, 1987 Order of the District Court A55

October 27, 1987 Order of the District Court A83

August 19, 1988 Judgment of the United States Court of Appeals for the Eighth Circuit A86

APPENDIX

(Filed August 19, 1988)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-1934
No. 86-2537
No. 87-1749
No. 87-2299
No. 87-2300
No. 87-2588

Kalima Jenkins, by her friend, Kamau Agyei; Carolyn Dawson, by her next friend, Richard Dawson; Tufanza A. Byrd, by her next friend, Teresa Byrd; Derek A. Dydell, by his next friend, Maurice Dydell; Terrance Cason, by his next friend, Antoria Cason; Jonathan Wiggins, by his next friend, Rosemary Jacobs Love; Kirk Allan Ward, by his next friend, Mary Ward; Robert M. Hall, by his next friend, Denise Hall; Dwayne A. Turrentine, by his next friend, Shelia Turrentine; Gregory A. Pugh, by his next friend, Barbara Pugh; Cynthia Winters, by her next friend, David Winters; on behalf of themselves and all others similarly situated,

and

American Federation of Teachers, Local 691,
Appellees,

v.

The State of Missouri, Honorable John Ashcroft, Governor of the State of Missouri, Wendell Bailey, Treasurer of the State of Missouri, Missouri State Board of Education,

Roseann Bentley,
Dan Blackwell,
Terry A. Bond, President,
Delmar A. Cobble,
Grover Gamm,
Jimmy Robertson,
Robert L. Welling,
Donald E. West,
Members of the Missouri State Board of Education,

Arthur L. Mallory, Commissioner of Education of the State of Missouri,
Appellants,

and

School District of Kansas City, Missouri and Claude C. Perkins, Superintendent thereof,
Appellees.

No. 87-2565

Kalima Jenkins, by her friend, Kamau Agyei, et al.,

and

American Federation of Teachers, Local 691,
Appellees,

v.

The State of Missouri, et al.,

and

School District of Kansas City, Missouri, et al.,
Appellees.

Icelean Clark; Bobby Anderton; Eleanor Graham; John C. Howard; Craig Martin; Gay D. Williams; Kansas City

Mantel & Tile Co.; Coulas & Griffin Insurance Agency, Inc.; Sharon Dunham; Lindsay K. Kirk; Linda Frazier; Rick Feierabend; Linda Hollenbeck; James Hollenbeck; Susan Horseman; and Clifford M. Horseman,
Appellants.

No. 87-2589

Kalima Jenkins, by her friend, Kamau Agyei, et al.,

and

American Federation of Teachers, Local 691,

v.

The State of Missouri, et al.,

and

School District of Kansas City, Missouri, et al.,
Appellees.

Icelean Clark; Bobby Anderton; Eleanor Graham; John C. Howard; Craig Martin; Gay D. Williams; Kansas City Mantel & Tile Co.; Coulas & Griffin Insurance Agency, Inc.; Sharon Dunham; Lindsay K. Kirk; Linda Frazier; Rick Feierabend; Linda Hollenbeck; James Hollenbeck; Susan Horseman; and Clifford M. Horseman,
Jackson County, Missouri;
Appellants.

No. 87-2659

Kalima Jenkins, by her friend, Kamau Agyei, et al.,
Appellants,

and

American Federation of Teachers, Local 691,

v.

The State of Missouri, et al.,
Appellees,

and

School District of Kansas City, et al.,
Appellees.

No. 88-1073

Kalima Jenkins, by her friend, Kamau Agyei, et al.,
Appellees,

and

American Federal of Teachers, Local 691,

v.

The State of Missouri, et al.

and

School District of Kansas City, Missouri, et al.,
Appellees,

Jackson County, Missouri; William Waris; Bernice J. Conley; Gary Panetheire; Beverly O. Ross; Michael Bendergast, their officials,
Appellants.

No. 88-1456

Kalima Jenkins, by her friend, Kamau Agyei, et al.,

and

American Federation of Teachers,
Local 691,

v.

The State of Missouri, et al.,
Appellees,

and

School District of Kansas City, et al.,
Appellants.

Appeal from the United States District Court for the Western District of Missouri.

Submitted: March 21, 1988
Filed: August 19, 1988

Before LAY, Chief Judge, HEANEY and JOHN R. GIBSON, Circuit Judges.

JOHN R. GIBSON, Circuit Judge.

The Kansas City School District desegregation case is before us again and we now must consider the scope of the remedies ordered by the district court,[1] specifically with respect to magnet schools and capital improvements, and the tax increases authorized to generate the Kansas City, Missouri School District's share of the costs of these programs.[2] We affirm the judgment of the district court with respect to scope of the remedy as to magnet schools and capital improvements with some slight modifications.

---

1. The Honorable Russell G. Clark, United States District Judge for the Western District of Missouri.

2. This appeal raises the propriety of some thirteen district court orders: those of June 16 and November 12, 1986, April 29, July 6, August 19, August 24, September 15, October 27, and November 13, 16, and 23, 1987, January 7, 1988, and March 1, 1988.

While we approve the order and conclusions of the district court with respect to the property tax, we modify its future operation to more closely comport with limitations upon our judicial authority, and we reverse that part of the district court's order establishing an income tax surcharge.

In this case the district court dealt with undisputed constitutional violations and its series of orders were necessary to remedy the lingering results of these violations, since local and state authorities had defaulted in their duty to correct them. *See Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971); *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955) (*Brown II*).

The Supreme Court has provided broad guidelines for the district courts in such cases. In *Milliken v. Bradley*, 433 U.S. 267 (1977) (*Milliken II*), the Court set forth a three part analysis of the district court's remedial power:

> In the first place, like other equitable remedies, the nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation. The remedy must therefore be related to 'the *condition* alleged to offend the Constitution . . . .' Second, the decree must indeed be *remedial* in nature, that is, it must be designed as nearly as possible 'to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.' Third, the federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution.

433 U.S. at 280-81 (citations omitted).

Our standard of review of the district court's actions within these limiting legal principles is restricted: "[T]he choice of remedies to redress racial discrimination is 'a balancing process left, within appropriate constitutional or statutory limits, to the sound discretion of the trial court." *United States v. Paradise*, 107 S. Ct. 1053, 1073 (1987) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 508 (1980) (Powell, J., concurring)); *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1236 (2d Cir. 1987), *cert. denied*, 1988 W.L. 62301, 62303 (June 13, 1988) (Nos. 87-1632, 1686). We have also recognized the importance of the district court's factual findings, which may not be disturbed unless clearly erroneous. Fed. R. Civ. P. 52(a); *Jenkins v. Missouri*, 807 F.2d 657, 666-67 (8th Cir. 1986) (en banc) (*Jenkins I*), *cert. denied*, 108 S. Ct. 70 (1987).

Bearing in mind these limitations on the district court's remedial power and on our scope of review, we turn to the constitutional violations identified by the district court.

The State has admitted and the district court judicially noticed that Missouri mandated segregated schools for black and white children before 1954. *Jenkins v. Missouri*, 593 F. Supp. 1485, 1490 (W.D. Mo. Sept. 17, 1984). KCMSD established and maintained segregated facilities with segregated staffs. There are still vestiges of the dual school system lingering in KCMSD, and KCMSD and the State have not met their obligations to disestablish that system. 593 F. Supp. at 1504.

The district court further found that "the inferior education indigenous of the state-compelled dual school system has lingering effects in the Kansas City, Missouri School District." 593 F. Supp. at 1492. "[W]itnesses confirmed the conclusion reached by the Supreme Court

in *Brown I* [*Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)] that forced segregation ruins attitudes and is inherently unequal * * *. The general attitude of inferiority among blacks produces low achievement which ultimately limits employment opportunities and causes poverty." 593 F. Supp. at 1492 (citations to the record omitted). "Segregation has caused a system wide *reduction* in student achievement in the schools of the KCMSD." *Jenkins v. Missouri*, 639 F. Supp. 19, 24 (W.D. Mo. June 14, 1985) (citations to record omitted) (emphasis in original).

The district court found that segregation in KCMSD caused the departure of the whites in the system to private schools and to the suburbs. Order of Aug. 25, 1986, slip op. at 1-2. *See also* Order of November 12, 1986, slip op. at 3. During the years between *Brown I* and trial, the enrollment of KCMSD shifted from predominantly white to predominantly black. In the 1958-59 school year, blacks constituted 22.5% of KCMSD enrollment, but by 1983-84 enrollment was 67.7% black and white enrollment had dropped 80%. 593 F. Supp. at 1495. "[A]s of 1974, 20 years after *Brown I*, 39 schools were more than 90% black * * *. Eighty percent of all blacks in the District attended schools that were 90% black * * *." *Id.* at 1492-93. KCMSD later reduced the number of over-90%-black-enrollment-schools, but the district court found in 1984 that KCMSD had still not completely dismantled the dual system. *Id.*

In discussing KCMSD's school buildings the district court made the stark finding that "[KCMSD's] physical facilities have literally rotted." *Jenkins v. Missouri*, 672 F. Supp. 400, 411 (W.D. Mo. Sept. 15, 1987). Specifically, the court found that "the overall condition of the KCMSD school buildings, particularly the interiors, is generally depressing and thus adversely affects the learning environ-

ment and continues to discourage parents who might otherwise enroll their children in the KCMSD." *Id.* at 403 (citations to record omitted). The district court found there were "numerous health and safety hazards, educational environment hazards, functional impairments, and appearance impairments" in the KCMSD's facilities, and catalogued examples of these problems and the evidence of them before the court. *Id.* at 403.

The district court made findings that both KCMSD and the State had caused the decay of the KCMSD's buildings. The court specifically found that "even if the State * * * did not directly cause the deterioration of the school facilities, it certainly contributed to, if not precipitated, an atmosphere which prevented the KCMSD from raising the necessary funds to maintain its schools." Order of November 12, 1986, slip op. at 4; *accord,* 672 F. Supp. at 403.

In response to these findings of vestiges of unconstitutional segregation, the court ordered remedial programs involving magnet schools and capital improvements.

The magnet plan provided that by 1991-92 every high school and middle school in the KCMSD and about half the elementary schools would become magnet schools with one or more distinctive themes, such as foreign languages, performing arts, and math and science. Order of Nov. 12, 1986, slip op. at 2. The elementary magnets were to be located at selected sites throughout KCMSD, with at least one magnet in each area of the KCMSD.[3]

---

3. The principal orders instituting the magnet schools plan were that of June 16, 1986, calling for expenditure of $12,972,727, of which the state was liable for $6,665,634, slip op. at 19; and November 12, 1986, calling for expenditure of $142,736,025, of which the State was solely liable for $89,877,724 and jointly and severally liable with KCMSD for the remainder. Slip op. at 6.

The district court also ordered a capital improvements program for KCMSD totaling some $260 million.[4] The principal capital improvement plan called for the closing of some eighteen KCMSD school facilities, construction of seventeen new facilities and renovation of others. 672 F. Supp. at 405. The portion of the plan the court ordered to be funded is scheduled for completion by the fall of 1990. *Id.*

In considering its final capital improvement order the district court gave specific attention both to KCMSD's proposal and the State's alternate proposal calling for approximately $61 million in renovations. *Id.* at 403-05. It rejected the State's recommendations as an inadequate "patch and repair" approach which would not serve the remedial goals established by the court, *id.* at 404, and concluded that the limited renovation the State proposed would result in the schools continuing to be "unattractive and substandard, and would certainly serve as a deterrent to parents considering enrolling their children in KCMSD schools." *Id.* at 405.

To enable KCMSD to fund its share of the costs of the desegregation plan, the district court imposed a 1.5 percent surcharge on income of residents and non-residents of KCMSD subject to the Missouri State income tax

---

4. The court ordered expenditure of $12,877,330 for capital improvements in its order of June 16, 1986, all of which was to be paid by the State, slip op. at 15; $52,858,301 in its order of November 12, 1986, for which the State and KCMSD were jointly and severally liable, slip op. at 5; $7,376,135 in its order of April 29, 1987, for which the State and KCMSD were jointly and severally liable, slip op. at 3; $353,061 in its order of July 7, 1987, slip op. at 12; and $187,450,334 in its order of September 15, 1987, for which the State and KCMSD were jointly and severally liable, with equal contribution, 672 F. Supp. at 408. Capital improvements ordered earlier have already been affirmed. *Jenkins I*, 807 F.2d at 685.

"for work done, services rendered and business or other activities conducted within the KCMSD." *Jenkins*, 672 F. Supp. at 412. The court also ordered the district's property tax levy to be increased to $4 per $100 assessed valuation through the 1991-92 fiscal year, and authorized KCMSD to issue $150,000,000 in capital improvement bonds, to be retired within twenty years. *Id.* at 413.

I.

The district court's remedial orders were based on the elementary principle that the victims of unconstitutional segregation must be made whole, and that to make them whole it will be necessary to improve their educational opportunities and reduce their racial isolation. The foundation of the plans adopted was the idea that improving the KCMSD as a system would at the same time compensate the blacks for the education they had been denied and attract whites from within and without the KCMSD to formerly black schools. *See* Order of June 16, 1986, slip op. at 17. The long term goal of the district court's effort was therefore:

> to make available to *all* KCMSD students educational opportunities equal to or greater than those presently available in the average Kansas City, Missouri metropolitan suburban school district. *In achieving this goal the victims of unconstitutional segregation will be restored to the position they would have occupied absent such conduct, while establishing an environment designed to maintain and attract non-minority enrollment.*

Id. (emphasis added); *accord*, 639 F. Supp. at 54.

In later orders the district court explained how the magnet school and capital improvement plans would bring about these ultimate objectives. The court found "that the proposed magnet plan would generate voluntary student transfers resulting in greater desegregation in the district schools." Order of November 12, 1986, slip op. at 3. The court specifically stated:

> [T]he plan would provide both minority and non-minority district students with many incentives to leave their neighborhoods and enroll in the magnet schools offering the distinctive themes of interest to them. Most importantly, the Court believes that the proposed magnet plan is so attractive that it would draw non-minority students from the private schools who have abandoned or avoided the KCMSD, and draw in additional non-minority students from the suburbs.

Id.

The district court thus articulated three remedial goals needed to restore the victims to the position they would have occupied without the State and KCMSD's constitutional violations: first, to improve the educational lot of the victims of unconstitutional segregation; second, to regain some portion of the white students who fled the district and retain those who are still there; and third, to redistribute the students within the KCMSD to achieve the maximum desegregation possible.

The State argues that the goal of attracting non-minority students from private schools and suburban schools is not warranted by the nature of the constitutional violation unless KCMSD and the State committed a specific violation causing students to withdraw from the sys-

tem. The State argues that under *Milliken v. Bradley*, 418 U.S. 717 (1974) (*Milliken I*), a court remedying an intradistrict violation must simply strive to distribute students within the district evenly by race. But this court has held in *Jenkins I*, 807 F.2d at 683-84, and *Liddell v. Missouri*, 731 F.2d 1294, 1302-08 (8th Cir.) (en banc) (*Liddell VII*), *cert. denied*, 469 U.S. 816 (1984), that *voluntary* interdistrict remedies may be used to make meaningful integration possible in a predominantly minority district.

These holdings are bolstered by the district court's findings that the preponderance of black students in the district was due to the State and KCMSD's constitutional violations, which caused white flight. The district court found that the existence of segregated schools led to white flight from the KCMSD to suburban districts and to private schools.[5] *E.g.*, Order of Aug. 25, 1986, slip op. at 1-2.

---

5. We asked the parties to provide agreed upon statistics for the number of children residing in the KCMSD who attend private schools, but they were unable to do so. Nevertheless, we are able to take notice of census figures on this subject for the City of Kansas City, though we realize its boundaries are not coterminous with those of the KCMSD. Census figures for 1980 show that about 17 percent of the school age children in Kansas City, Missouri are in private schools. U.S. Dept. of Commerce, Bureau of the Census, 1980 Census of Population, General Social and Economic Characteristics, Missouri 27-12 (1983). They further indicate that about 71 percent of the total Kansas City, Missouri population is white, U.S. Dept. of Commerce, Bureau of the Census, 1980 Census of Population and Housing, Advance Estimates of Social, Economic and Housing Characteristics, Missouri 27-61 (1983), and that about 60 percent (56,486) of the children ages 5-18 in Kansas City are white and about 37 percent (34,874) are black, *see* U.S. Dept. of Commerce, Bureau of the Census, 1980 Census of Population, General Population Characteristics, Missouri 27-54 (1982). The record in this case indicates that the KCMSD enrollment was approximately 68.3 percent black in 1985. See Order of June 14, 1985, slip op. at 31.

See also Order of November 12, 1986, slip op. at 3. This finding is implicitly recognized in the court's remedial orders with the express goal of attracting back the students who had left KCMSD schools.

These findings that the unconstitutional segregation caused the KCMSD to lose certain students form the basis for a remedy designed to attract such students back. Without regaining those students who have already fled, the desegregation effort in this case will take place in a school district with a preponderance (roughly 70%) of black students, despite its majority white population. Under such circumstances, the State's position would effectively defeat any possibility of meaningful integration.

The State argues that any consideration of white flight to the suburban districts runs contrary to our earlier holdings and to earlier findings of the district court. These arguments simply miss the mark. *Jenkins I* dealt with white flight in the context of a claim for interdistrict relief. We first note that three judges of this court would have found an interdistrict violation, 807 F.2d at 696 (Lay, C.J., dissenting), and that the four judges that concluded there was not such a violation concluded that KCMSD's segregation had no substantial segregative effect *in the SSD's*. *See id.* at 680-81. This finding concerning segregation in the SSD's is not inconsistent with a further finding that KCMSD's segregation caused it to lose significant numbers of its white students and that regaining those students is a necessary part of restoring the victims to the condition they would have enjoyed had there been no constitutional violation.

The State further argues that it cannot be responsible for the voluntary departure of white students from the

school district and that white flight "is usually a reaction to just the sort of change that federal courts seek to implement." State's Reply Brief at 9. This argument does not necessarily contradict the district court's findings that state-imposed segregation caused white flight and that the failure to eliminate the vestiges of discrimination contributed to the decline in the educational quality and physical plant of the KCMSD school system. In any event, such court-ordered integration would not have been necessary had the State not unconstitutionally mandated a dual school system and then failed to eliminate the vestiges of segregation.

The State also attacks the goal of improving the education of all KCMSD students, arguing that this remedial goal exceeds the scope of the violation, because it seeks to benefit all KCMSD students, not just those minority students who have suffered from the effects of the constitutional violations. Careful reading of the district court's order shows that the court did not view improving education for all KCMSD students as an end in itself, but as a means to serve the goals of restoring to the victims the education they have been denied and of attracting and maintaining whites in the KCMSD. *See* Order of June 16, 1986, slip op. at 17 (language quoted at p. 11, *supra*); 639 F. Supp. at 54. We cannot say that the district court abused its discretion in using system-wide educational enhancements to accomplish its legitimate desegregative objectives. Moreover, this court has approved remedial programs for the benefit of all students in a district where the children have been deprived of the right to a desegregated education. *See Little Rock School District v. Pulaski County Special School District No. 1,* 839 F.2d 1296, 1308 (8th Cir. 1988).

The State next argues that the findings of the district court do not identify statistics for student enrollment that would indicate that KCMSD had become a unitary school district. The State argues that without such findings, there can be no objective evaluation of whether the plans ordered are well-crafted to achieve unitariness.

The State's argument would have more force if we dealt only with a question of student assignment. We have before us a system-wide desegregation remedy involving magnet schools and capital improvements that is planned for completion over a five year period. One of the most complex questions in desegregation litigation is that of when a district has become unitary. We decline to give an advisory opinion on that issue, but leave it for consideration when the programs planned through the 1991-92 year have been implemented.

Next, the State argues that the magnet school plan adopted by the district court does not serve the court's avowed goals. These arguments attack the district court's factual findings and therefore must be reviewed under the clearly erroneous standard.

First, the State contends that the extent of magnet schools ordered exceeds the amount necessary to achieve uniform distribution of minority and majority race students at schools within the district, or even disserves the goal of uniform distribution.

The State argues that the plan simply includes too many magnet schools—that it is extravagant. The district court specifically addressed the State's concern over making magnet schools of all the senior high and middle schools and half the elementary schools. It observed

that in the ordinary magnet plan, because of limitations on the number of students who may be enrolled, "for each non-minority student who enrolls in the magnet school a minority student, who has been the victim of past discrimination, is denied admittance." Order of Nov. 12, 1986, slip op. at 3. It found that "[w]hile these plans may achieve a better racial mix in those few schools, the victims of racial segregation are denied the educational opportunity available to only those students enrolled in the few magnet schools. This results in a school system of two-tiers as it relates to the quality of education. This inequity is avoided by the KCMSD magnet school plan." *Id.* The State in its filings with the district court cautioned about creation of a two-tiered system of schools in which "existing schools are, or are perceived to be, markedly inferior." Response of State to KCMSD motion for approval of 1986-87 magnet programs, p. 12. The State's expert witness, Dr. Doyle, echoed this concern and suggested that one way to avoid the problem was to convert an entire school system to magnet schools. Tr. 376, 381-82, June 5, 1986. Another State's witness, Dr. Cooper, also agreed on cross-examination that the comprehensiveness of the plan was a step in the right direction. Tr. 890, Sept. 18, 1986. The district court's finding regarding the need for the number of magnet schools authorized by the plan is amply supported by the State's own evidence.

The State also argues that by locating magnet schools within white neighborhoods as well as black neighborhoods, the plan will defeat integration by allowing children to attend magnet schools within their own neighborhoods. The plan was fashioned to prevent such a result. The plan offers different themes in numerous

elementary schools in the district, some located close to suburban areas and others in heavily minority residential districts. The various schools should therefore draw students from all parts of the district and increase the desegregative opportunity. The plan builds upon this by providing middle and high school magnet programs, giving those attending elementary school magnets a strong incentive to stay in the district throughout their school years. The State's expert, Dr. Doyle, agreed that this feeder pattern would be desegregative. Tr. 808, Sept. 18, 1986.

The State also attacks the district court's findings that the magnet plan will provide schools that are attractive to whites not currently attending KCMSD schools. Order of Nov. 12, 1986, slip op. at 3. However, the State has pointed to no evidence in the record persuading us that this finding is clearly erroneous.

We conclude that the district court's finding that the magnet plan was properly designed to achieve voluntary desegregation is not clearly erroneous.

II.

The State attacks the scope of the capital improvements plan and argues that the plan was not fashioned to further the court's remedial goals.[6]

The district court found that the capital improvements program "is a proper remedy through which to remove the vestiges of racial segregation, and is needed

---

6. The State also attacks the goals of the capital improvements plan. Since the capital improvements plan serves the same remedial goals as the magnet school plan, our magnet school discussion answers the State's arguments.

to attract non-minority students back to the KCMSD." Order of November 12, 1986, slip op. at 4. Moreover, because unconstitutional segregation was in part responsible for the decay of KCMSD's buildings, capital improvements were necessary to restore the victims to their rightful place. *Id.*

The State argues that the district court strayed from the dictates of *Milliken II* by failing to show that the State's constitutional violations caused the condition which the capital improvement programs were meant to remedy. It argues that the decay in KCMSD's schools occurred because KCMSD was unable to raise funds for maintenance from its taxpayers, and the district court made no findings that the voting by KCMSD voters was discriminatory, or that the State is legally responsible for the voting patterns. Thus, according to the State, the district court required it to remedy problems of decay that were not caused by the State's constitutional violations.

There are ample findings supporting the district court's conclusion that the State is partly to blame for the decay of KCMSD's facilities. The district court found that the State by its constitutional violations and failure to remove the vestiges of the dual school system "contributed to, if not precipitated, an atmosphere which prevented the KCMSD from raising the necessary funds to maintain its schools." Order of November 12, 1986, slip op. at 4. It had earlier found that such lack of maintenance was "further evidence of the detrimental effects that segregation has had on this school district's ability to raise adequate resources." 639 F. Supp. at 41.

The State argues that the lack of funding of KCMSD is simply independent action of the voters of KCMSD

for which the State may not be liable. But there is support in the record for the court's findings that segregation and the failure to remove the vestiges of the dual school system contributed to the atmosphere preventing KCMSD from raising necessary funds. The findings of fact demonstrate a spiraling effect of white children leaving KCMSD schools and KCMSD's white constituency withdrawing its financial support from the system. This process eventually caused the decay of KCMSD's school buildings, which in turn fed the cycle.[7]

Further, this argument advanced by the State attacks an aspect of the court's findings that was merely an alternative basis for its conclusion. The district court also found:

> The improvement of school facilities is an important factor in the overall success of this desegregation plan. Specifically, a school facility which presents safety and health hazards to its students and faculty serves both as an obstacle to education as well as to maintaining and attracting non-minority enrollment. Further, conditions which impede the creation of a good learning climate, such as heating deficiencies and leaking roofs, reduce the effectiveness of the quality education components contained in this plan.

---

7. The Jenkins class argues that there was systematic refusal by taxpayers to vote levy increases or bond issues "dating from precisely the moment when the school district became majority black." Jenkins Brief at 20. They further argue that the black wards tended to give highest voter percentages in favor of revenue measures. The record tends to support these arguments, but as the district court did not base its findings of fact and conclusions of liability on this theory, we need say no more.

639 F. Supp. at 40. Even absent the findings that the State contributed to causing the decay, the capital improvements would still be required both to improve the education available to the victims of segregation as well as to attract whites to the schools.

In *Jenkins I*, we held that the district court's findings were sufficient to support its conclusion that capital improvements are necessary for successful desegregation. 807 F.2d at 685. We specifically recognized the findings that "conditions which impede the creation of a good learning climate * * * reduce the effectiveness of the quality education components contained in this plan." *Id.* (quoting Order of June 14, 1985 at 34).

Similarly, in *Liddell VII*, 731 F.2d at 1318-19, we affirmed an order requiring the State to pay one-half of the cost of a capital improvements program necessary to restore city facilities to a constitutionally acceptable level. The State filed a petition for certiorari directed to this issue, which was denied.[8] *See* Petition for Certiorari at 24-28, *Missouri v. Liddell*, 469 U.S. 816 (1984) (No. 83-1721).

The State further argues that the facility improvements are more than is necessary to carry out the educational components of the desegregation plan. However, the district court found that the overall condition of the school buildings "adversely affects the learning environment and continues to discourage parents who might

---

8. We recognize that the Supreme Court has on a number of occasions commented on the lack of precedential value of such denials. *See generally* L. Stern, E. Gressman & S. Shapiro, Supreme Court Practice (6th ed. 1987) § 5.7. On the other hand, we have earlier commented that such denials "cannot be overlooked." *Wells v. Meyer's Bakery*, 561 F.2d 1268, 1275 (8th Cir. 1977).

otherwise enroll their children in the KCMSD." 672 F. Supp. at 403. The district court catalogued the poor conditions prevailing in KCMSD's school buildings. *Id.;* 639 F. Supp. at 39-40. Certainly defective lighting, inadequate heating, stench from toilet facilities, and other conditions affecting the appearance of the schools and comfort of the students affect not only the quality of education that may be obtained there, but also whether parents will withdraw their children from such schools or reenroll them there.

Finally, the State attacks certain aspects of the capital improvements plan as extravagant. We have examined the many instances the State points out and conclude there was substantial testimony demonstrating the justification for these portions of the plan. We mention only one example of the State's objections. The State objected to a 25 acre farm and 25 acre wildland area that had been ordered for the magnet schools. State's Brief at 56. However, a similar twenty-three acre museum and laboratory in a science program at Shawnee Mission South High School in Shawnee Mission, Kansas (which lies approximately a mile to the west of the southern portion of KCMSD) was recently commended by Secretary of Education William J. Bennett. James Madison High School, A Curriculum for American Students 34 (1987). The findings of the district court demonstrate that the capital improvements program is essential to assure the quality of education and future success of the magnet schools necessary to remedy the constitutional violations in KCMSD.

From materials that have been filed with us concerning the financial needs of the KCMSD, it is apparent that the capital improvements plan that we affirm today does not cover all expenditures that may be necessary between

now and the 1991-92 school year, specifically some $16 million for land acquisition and asbestos removal costs. We are informed by the post-argument filings that KCMSD's bond issue has been sold, and that the net proceeds are in the hands of the district. Presumably, these funds will produce substantial interest income before all will be expended in the renovation and construction program. The State is entitled to a determination of the extent of its liability through the 1991-92 fiscal year, and we conclude that the approximately $150,000,000 which is the State's share of capital improvements should be the limit of its contribution for capital expenditures for that period. When the second phase of the capital improvements program is to be considered, we hope that the parties will be able to agree upon a further plan. If they are not, the district court will then be in position to evaluate the success of the program that we have affirmed today and determine what further steps are necessary to remedy the constitutional violations and what further contributions from the State may be required. We observe that the present estimate of the phase two capital improvement program is in the $200 to $300 million range. Any issues regarding this program will simply have to be resolved in the future, as more information is developed.

III.

The State also argues that the capital improvements ordered by the district court violate the eleventh amendment "by requiring payment measured by past activities." In the State's view, the orders measure liability and require payments on the basis of actions taken "at a time when [the State] was under no court-imposed obligation to conform to a different standard." *Edelman v. Jordan,*

415 U.S. 651, 668 (1974). The State contends that the capital improvements orders are therefore "little different, in practical terms, from a requirement that the State pay over to the KCMSD all the funds that the district would have raised from successful [tax or bond] proposals," State's Brief at 50, or "an order to pay the KCMSD for the lost value of the deteriorated buildings." State's Brief at 26. Relying principally on *Edelman*, 415 U.S. at 668; *Papasan v. Allain*, 106 S. Ct. 2932, 2942 (1986); and *Miener v. Missouri*, 673 F.2d 969, 982 (8th Cir.), *cert. denied*, 459 U.S. 909 (1982), the State concludes that the capital improvements orders are an award of retroactive relief, barred by the eleventh amendment.

This argument is without merit. The orders for capital improvements were made necessary in large part by the State's past actions, *e.g.*, *Jenkins*, 672 F. Supp. at 403, and the extent of relief ordered was "determined by the nature and scope of the constitutional violation[s]," *Milliken II*, 433 U.S. at 280, including the State's past violations, *e.g.*, *Jenkins*, 672 F. Supp. at 403. The orders nonetheless operate prospectively "to wipe out continuing conditions of inequality" produced by Kansas City's dual school system and are therefore valid under the eleventh amendment. *Milliken II*, 433 U.S. at 290. Specifically, the capital improvements orders require the State to participate with the school district in funding planned renovation and construction projects which the district court determined, in findings we uphold today, to be necessary to remedy the continuing effects of state-imposed segregation in Kansas City. *See id.* at 289-90; *Swann*, 402 U.S. at 15. The relief granted to the school children in the form of improved physical facilities is wholly prospective

in nature, requiring "payment of state funds * * * as a necessary consequence of compliance in the future with a substantive federal question determination * * *." *Edelman,* 415 U.S. at 668, *quoted in Milliken II,* 433 U.S. at 289. The relief is readily distinguishable from the award of retroactive payments for withheld disability benefits in *Edelman,* 415 U.S. at 663-64, the claim for restoration of a depleted trust corpus and lost income in *Papasan,* 106 S. Ct. at 2942, or the claim for compensatory educational services under the Education of the Handicapped Act, 20 U.S.C. §§ 1401-1485 (1982), in *Miener,* 673 F.2d at 982. The eleventh amendment does not bar the capital improvements ordered by the district court.

An argument essentially identical to the State's was rejected by the Supreme Court in *Milliken II,* 433 U.S. at 288-90. The State attempts to distinguish *Milliken II* by arguing that the program involved there was "narrowly tailored to the needs of particular students and necessary to the successful movement of students from minority schools to desegregated schools," whereas the programs involved here "simply make up for all the cumulative effects of past neglect." This argument is in essence a restatement of the State's position that the capital improvements ordered by the district court are not necessary to achieve desegregation—a position which we have already rejected on the basis of the district court's findings.

IV.

The State also argues that the district court erred in its allocation of costs between KCMSD and the State. In *Jenkins I,* 807 F.2d at 684-86, we determined that the district court order apportioning costs should be modified to reflect our decision in *Liddell VII* that funding be

equally divided between the State and the school district, because the order contained no findings regarding the relative responsibility of the State and KCMSD for these costs. 807 F.2d at 684, 685. The State argues that this determination of 50-50 responsibility should continue to govern.

Following our earlier decision, the district court gave further consideration to the allocation of costs, particularly with reference to magnet schools. The district court recognized that the State had created the dual school system, and that KCMSD was required to implement this system under Missouri law. It observed that both the State and KCMSD had failed to eliminate the vestiges of this system. The court reasoned that "the person who starts the fire has more responsibility for the damages caused than the person who fails to put it out." Order of July 6, 1987, slip op. at 13. The court observed that the Missouri Supreme Court had adopted the Uniform Comparative Fault Act in *Gustafson v. Benda*, 661 S.W.2d 11 (Mo. 1983) (en banc). Order of July 6, 1987, slip op. at 14. The district court also noted KCMSD's inability to fund more than twenty-five percent of the costs of the entire remedial plan. *Id.* at 14. The court therefore concluded that the State was responsible for seventy-five percent of the costs of desegregation, and KCMSD for twenty-five percent.[9]

Allocation of costs is part of the remedial power of the district court. *United States v. Bd. of School Com-*

---

9. With respect to the capital improvement plan the district court found that because the improvements have a useful life of 30 to 50 years, the costs should be shared evenly. 672 F. Supp. at 408.

missioners, 677 F.2d 1185, 1186 (7th Cir.), *cert. denied*, 459 U.S. 1086 (1982). Our earlier order did not foreclose the district court's further consideration of the issue, and we are satisfied that the district court did not abuse its discretion in making this allocation, nor was its factual determination as to percentages of fault clearly erroneous. We have in other desegregation cases approved varying percentages of contribution, including allocating to the state 100 percent of the costs in certain portions of the plans. *Little Rock School Dist. v. Pulaski County Special School Dist. No. 1*, 778 F.2d 404, 435-36 (8th Cir. 1985); *Little Rock School Dist.*, 839 F.2d at 1306-09. Other courts have similarly placed more than 50 percent of the cost on the State. *See, e.g., Bradley v. Milliken*, 540 F.2d 229, 246 (6th Cir. 1976), *aff'd*, 433 U.S. 267 (1977) (seventy-five percent of the cost of purchasing school buses placed on state). The district court was aware of the serious limitations on KCMSD's capability of raising revenue. Its observation that the State has adopted a comparative fault system had substantial relevance in its determination. We affirm the allocation of costs based upon the further findings of the district court and conclude that our earlier decision en banc did not bar such determinations.

V.

The orders of the district court raising the KCMSD property tax levy and imposing a state income tax surcharge are targets of the State's appeal and an appeal filed by Jackson County, Missouri. The county's appeal is directed particularly to the temporary restraining order and preliminary injunction requiring its officials to collect the property tax levy, and the permanent injunction

entered on January 7, 1988. We have also accepted numerous amicus briefs on this issue.[10]

In addressing the funding of KCMSD's share of the remedy, the district court found "that the KCMSD is unable with its present resources to raise revenues to fund its share of the costs assessed under the desegregation orders." *Jenkins,* 672 F. Supp. at 411. The court also found that "[t]he KCMSD has exhausted all available means of raising additional revenue, including presenting a bond issue in 1987 and tax levy increase proposals to the voters in four separate elections in 1986 and 1987." *Id.* The court noted that it had encouraged the Missouri General Assembly to consider legislation affording the district more versatility to raise funds to support a desegregation program, and found that such legislation had been introduced, was received unfavorably, and ultimately failed. *Id.* The court concluded that it had explored all the alternatives set forth in *Liddell VII,* 731 F.2d at 1319-23, and that it was "left with no choice but to exercise its broad equitable powers and enter a judgment that will enable the KCMSD to raise its share of the cost of the plan * * *." *Jenkins,* 672 F. Supp. at 411.

---

10. Briefs opposing the taxes were filed by the United States; a group of Kansas City area taxpayers who are paying the newly ordered taxes; the State of Kansas, whose argument was directed only to the income tax surcharge; the Washington Legal Foundation, Senator John Danforth, and two members of the Missouri House of Representatives; 56 rural Missouri school districts; the Missouri Association of Rural Educators, whose argument attacked primarily the scope of the relief ordered and the amount of state funds diverted to the district by the court's order; and the National Association of Independent Insurers, which objected only to the income tax surcharge imposed on insurance premiums received from business conducted in the KCMSD area. Briefs supporting the taxes were filed by the Lawyers Committee for Civil Rights, the NAACP, and the Civic Council of Greater Kansas City.

The district court ordered the property tax levy to be increased to $4 per $100 assessed valuation through the 1991-92 fiscal year, and authorized KCMSD to issue $150,000,000 in capital improvement bonds, to be retired within twenty years. *Id.* at 413.[11] In its October 27, 1987 order, it earmarked the proceeds of the property tax increase for retirement of capital improvements bonds, with any excess to be used to fund other desegregation costs. At the end of the 1991-92 fiscal year, only that portion of the increase necessary to maintain payments on the bonds was to remain in effect until either the bonds were retired or other provisions were adopted to insure retirement. Order of October 27, 1987, slip op. at 2.

The district court also imposed a 1.5 percent surcharge on income of residents and non-residents of KCMSD subject to the Missouri State Income Tax "for work done, services rendered and business or other activities conducted within the KCMSD." *Jenkins,* 672 F. Supp. at 412. The State Department of Revenue was required to collect the tax, and KCMSD was required to publish legal notice of the increase. Those legally responsible for withholding the state income tax are also required to withhold the surcharge. The court initially designated the revenue for use to retire capital improvement bonds, but removed this limitation in its October 27 order.

The court based its power to order tax increases and bond issuances to remedy constitutional violations on *Liddell VII,* 731 F.2d at 1322, and *Griffin v. School Bd.,* 377 U.S. 218, 233 (1964). *Jenkins,* 672 F. Supp. at 411-12.

---

11. The bonds require an annual debt service for principal and interest of approximately $14.9 million per year.

The State and amici argue that the district court exceeded its judicial authority in imposing the property tax increase and income tax surcharge, invaded legislative authority in doing so, and violated the Tenth Amendment, the doctrine of separation of powers, and principles of comity. In addition, they attack this court's en banc decision in *Liddell VII*, argue that later decisions limit it, and urge distinctions between the issues presented in this case and the Supreme Court's holding in *Griffin*.

A.

We first deal with a number of general arguments offered by the State and amici, based on the constitutional foundations of judicial power. They first offer an historical argument, relying on a number of The Federalist Papers, particularly number 78, which states that "[t]he judiciary * * * has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever." The Federalist No. 78 (A. Hamilton) (H. Lodge ed. 1888). While Hamilton stressed the weakness of the judiciary, we do not believe The Federalist advocates judicial impotence. Hamilton also stated that the complementary limitations on legislative authority "can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing." *Id.*

For the most part the arguments of the State and amici either ignore the constitutional violations that the district court found and we have affirmed, or would render the courts powerless to redress such violations. The ju-

diciary's power to determine the rights and liabilities of parties in cases arising under the Constitution and laws of the United States is beyond question, and this power is without purpose if it does not carry with it the power to determine a remedy. *See Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 162-63, 166-67, 176-80 (1803).

We may also dismiss summarily the State's related arguments based on the tenth amendment and the principle of separation of powers. These doctrines simply have no bearing on the district court's options in enforcing its judgment. In *Milliken II*, 433 U.S. at 291, the Supreme Court rejected the argument that a school desegregation remedy violated the tenth amendment, stating: "The Tenth Amendment's reservation of nondelegated powers to the States is not implicated by a federal-court judgment enforcing the express prohibitions of unlawful state conduct enacted by the Fourteenth Amendment." The Court has likewise stated that "the separation-of-powers principle * * * has no applicability to the federal judiciary's relationship to the States." *Elrod v. Burns*, 427 U.S. 347, 352 (1976) (plurality opinion by Brennan, J.).

The State's argument on principles of federal/state comity is a matter of more concern to us, but we will deal with it as we discuss the specific issues before us.

B.

This panel does not write on a clean slate with respect to the property tax issue. The court en banc has held that "the district court's broad equitable powers to remedy the evils of segregation include a narrowly defined power to order increases in local tax levies on real estate. Limitations on this power require that it be ex-

ercised only after exploration of every other fiscal alternative." *Liddell VII*, 731 F.2d at 1320.

We enumerated in *Liddell VII* three inquiries necessary in determining whether fiscal alternatives are unavailable or insufficient to finance a desegregation order: first, what amount of money is necessary to fund the order; second, whether the school board is able with its resources to fund its share of the costs; and third, whether the school board has considered alternative sources of revenue, such as the submission of a referendum or legislative authorization for the board to impose other taxes. Finally, if such alternatives fail and the board and the State as joint tortfeasors are unable to agree on an alternative method of funding, then the district court must conduct an evidentiary hearing and enter a judgment sufficient to cure the constitutional violations found. *Id.* at 1323.

The district court in this case carefully followed the requirements of *Liddell VII*. *See Jenkins*, 672 F. Supp. at 411. Voluminous materials were filed with the court before entry of the order, and the parties specifically waived their right to an evidentiary hearing on this issue. In 1986 and 1987 KCMSD submitted four levy increase and one bond referenda, all of which failed, and unsuccessfully sought legislative authorization for additional funding methods.[12] This fully satisfies *Liddell*, and we should require no more. We do not agree with the dissent's suggestion that we place the entire funding burden on the State under the principle of joint and several liability, leaving the State to its contribution remedy. This would simply prolong the controversy, rather than resolving this

---

12. See footnotes 16 and 20, *infra*.

already lengthy litigation, and would, in the end, meet the same obstacle the district court faced—the fact that KCMSD's contribution can only come from additional taxes or authorization of new sources of revenue.

Liddell VII explored in detail the support for its conclusion that a district court may order a property tax increase in such circumstances, including *Griffin v. School Bd.* and *United States v. Missouri*, 515 F.2d 1365 (8th Cir.) (en banc), *cert. denied*, 423 U.S. 951 (1975). In *Griffin*, the Supreme Court held that a district court could enjoin county authorities from paying tuition grants and giving tax credits while its public schools remained closed to avoid desegregation and, "if necessary to prevent further racial discrimination, require the Supervisors to exercise the power that is theirs to levy taxes to raise funds adequate to reopen, operate, and maintain without racial discrimination a public school system * * * like that operated in other counties in Virginia." 377 U.S. at 233. In *United States v. Missouri*, three St. Louis suburban school districts were consolidated and the tax rate for the consolidated district was set at the rate of the higher of the three districts. 515 F.2d at 1371-73. There, we "also acknowledged the district court's remedial power to require a tax levy in excess of that authorized by the voters." *Liddell VII*, 731 F.2d at 1320 (citing *United States v. Missouri*, 515 F.2d at 1371-72).[13]

---

13. The court in *Liddell VII* found further support for its reasoning in a number of Supreme Court decisions ordering municipalities to levy and collect taxes for satisfying their contractual obligations, and rejecting arguments that state law restrictions on the power to tax prevented them from doing so. 731 F.2d at 1322. The court also relied on numerous decisions based on state law that municipalities may not avoid their liability in tort by pleading constitutional or statutory debt limitations. *Id.*

The State and amici primarily attack *Liddell VII* by raising questions about its underpinnings, particularly by arguing that *Griffin* and *United States v. Missouri* only authorize a court to order the levy of taxes that have already been authorized by state law or to invalidate state action taken in resistance to a desegregation order.

The decision of the court en banc in *Liddell VII* is the law of this circuit, binding on this panel, and requires that we affirm the district court's order with respect to the property tax increase. *Liddell VII* analyzed decisions cited by the parties in support of their arguments that the district court lacks power to order a property tax increase, including *Evans v. Buchanan*, 582 F.2d 750 (3d Cir. 1978) (en banc), *cert. denied*, 446 U.S. 923, *reh'g denied*, 447 U.S. 916 (1980), which it determined to support its ruling,[14] and *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), which it distinguished. *Liddell VII*, 731 F.2d at 1321-22. Following the decision in *Liddell VII*, the State of Missouri filed a petition for certiorari raising the propriety of the holding on property taxes, and the petition was denied. *Leggett v. Liddell*, 469 U.S. 816 (1984) (No. 83-1386).

Judge Clark's order may thus be affirmed solely on the basis of *Liddell VII*.[15] It is not necessary, however,

---

14. Like *Evans*, 582 F.2d at 780, *Plaquemines Parish School Bd. v. United States*, 415 F.2d 817, 833-34 (5th Cir. 1969), which is also cited by the State, recognized and upheld the power of the district court to enter an injunction requiring the State to make funds available to the school board to pay for the desegregation plan drawn by the district court.

15. The amici point to the opinions of dissenting judges in *Liddell VII*. We must first observe that the entire court, including the dissenting judges, is bound by this court's en banc

(Continued on following page)

that we do so, for even without relying on *Liddell VII*, we believe that the district court's property tax, as modified in this opinion, is within the proper limits on its remedial powers.

Among the several sources of funds available to KCMSD under Missouri law, only the tax on real and personal property located within the district is under the school board's control. Substantial limitations are placed on this tax by the state constitution and statutes. The tax levy is limited to $1.25 per $100 of assessed valuation, but a majority of voters may approve a levy of $3.75 per $100. Mo. Const. art. X, §§ 11(b), 11(c). Any increase above the rate of $3.75 requires approval by two-thirds of the voters. Mo. Const. Art. X, § 11(c). Any school construction or repair bonds must also be approved by two-thirds of the voters. Mo. Rev. Stat. § 164.151 (1986).

These requirements, particularly the two-thirds vote, have had substantial impact upon KCMSD's financial resources. On June 20, 1969, the district submitted a levy increase of $3.05 above the constitutional $1.25 limit, for a total of $4.30. This was approved by 53 percent of the voters, but failed as it lacked a two-thirds majority. Shortly thereafter, on July 1, 1969, the voters approved by a 63 percent vote a $2.50 increase to make a total levy of $3.75. This increase required only a simple majority and is the last to date approved by the necessary percentage of KCMSD voters. Some six levy increases were

---

Footnote continued—

decision in *Liddell VII*. Further, the dissents did not imply that a district court should be left powerless to enforce remedial orders, as the amici propose. *See, e.g.*, 731 F.2d at 1332 (Gibson, J., concurring and dissenting).

submitted between 1970 and 1983. Four received the approval of a simple majority, but all six failed to receive the required two-thirds approval.[16]

Exhibits before the district court in *Jenkins I* reveal that between 1974 and 1982 the levy varied between $4.05 and $3.80. In *Jenkins I*, 807 F.2d at 686, we observed that the levy in KCMSD was $3.43 per $100. The district court order presently before us finds that the levy has been reduced to $2.05. *Jenkins*, 672 F. Supp. at 413. This substantial reduction of the levy is due to the operation of additional restrictions imposed by state laaw.

Missouri's Proposition C was adopted by initiative on November 2, 1982. Proposition C allocates one cent on the dollar of the state sales tax to the School District Trust Fund, Mo. Rev. Stat. §§ 144.700-.701 (1986), to be distributed in accordance with Mo. Rev. Stat. § 163.087 (1986). It reduces the total operating levy in each school district to decrease the revenue received by an amount equal to 50 percent of the previous fiscal year's sales tax receipts. Mo. Rev. Stat. § 164.013 (Supp. 1987).[17] In addition, the Hancock Amendment, also adopted by initiative, 1980 Mo. Laws 629, mandates revision of levy rates so that the same amount of tax revenue, adjusted for in-

---

16. Levy increases were also submitted on February 4, 1986, August 5, 1986, November 4, 1986, and March 31, 1987, the last three containing separately submitted issues for earmarked usage such as salary increases, bond retirement, and desegregation expenses. Only one of the eight submitted issues required approval by two-thirds, but all failed of passage.

17. The statute provides exclusions for sales tax revenue attributable to pupils residing on federal lands, and an amount necessary to maintain the commissions of county officials and county funds under Mo. Rev. Stat. § 50.338 (1986). The statute also provides that if a district fails to reduce its operating levy in compliance with this section, state aid under Mo. Rev. Stat. § 163.031 (1986) will be reduced in an equivalent amount.

flation, will be produced from existing property after reassessment as was produced in the previous year. Mo. Const. art. X, §§ 16-24; Mo. Rev. Stat. § 137.073 (1986). State-wide reassessment of real estate has been required under Mo. Rev. Stat. § 137.115 (Supp. 1987), and the total assessed valuation of property in KCMSD increased from approximately $1.2 billion in 1983 to nearly $1.8 billion in 1987.

These changes in state law have imposed a unique fiscal disadvantage on KCMSD, depriving it of the benefit of increases in assessed valuation and diverting nearly one-half of the sales taxes collected in the district to other parts of the state. An exhibit before the district court demonstrated that sales tax collections within KCMSD were $31.2 million, of which only $14.6 million were allocated to KCMSD for school use. As no other funding has been forthcoming, the levy reductions mandated by the Proposition C sales tax and reassessment rollbacks have caused the dramatic reduction of KCMSD's levy to its present level of $2.05. The laws of Missouri have thus erected a complicated structure restricting KCMSD's ability to increase its levy and fund its share of the desegration remedy.

Thus, state law so narrowly circumscribes KCMSD's ability to raise money that, if forced to operate within these limits, the district court would lack power to implement a remedy. The Supreme Court has made it clear that state law limitations cannot hinder a district court from remedying constitutional violations. In *North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43, 45 (1971), Chief Justice Burger, writing for a unanimous Court, stated that "if a state-imposed limitation on a school authority's discretion operates to inhibit or obstruct the

operation of a unitary school system or impede the disestablishing of a dual school system, it must fall; state policy must give way when it operates to hinder vindication of federal constitutional guarantees." *See also Milliken I*, 418 U.S. at 744. "We have likewise held in ordering implementation of a school integration plan that 'the remedial power of the federal courts under the Fourteenth Amendment is not limited by state law.'" *United States v. Missouri*, 515 F.2d at 1372-73 (quoting *Haney v. County Bd. of Educ.*, 429 F.2d 364, 368 (8th Cir. 1970)).

Moreover, this general supremacy principle applies in cases concerning state tax laws as well as any other type of state laws. The Supreme Court's citation of *Griffin* to support this general principle shows that the Court does not view *Griffin* as limiting federal courts' authority to order taxes to cases where no state law would be violated. In *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, *modified on other grounds sub nom. Washington v. United States*, 444 U.S. 816 (1979), a district court's decree concerning an Indian treaty required state officials to act contrary to state law limitations on their powers. The Supreme Court cited *Swann* and *Griffin* in upholding the district court's powers to order the state officials to take actions contrary to state law:

> State-law prohibition against compliance with the District Court's decree cannot survive the command of the Supremacy Clause of the United States Constitution. It is also clear that [the state] parties to this litigation * * * may be ordered to prepare a set of rules that will implement the Court's interpretation of the rights of the parties even if state law withholds from them the power to do so. *E.g., North Carolina*

Board of Education v. Swann, 402 U.S. 43; *Griffin v. County School Board*, 377 U.S. 218.

Id. at 695 (other citations omitted). In *Washington State*, as in this case, there was no suggestion that state law restrictions had been adopted to evade the court's remedial orders.

With these precedents, we must reject the State's arguments that the district court's power to raise property taxes under *Griffin* is limited to cases in which the taxes have been authorized under state law or the state law limitations on a school district's taxing authority are enacted to prevent implementation of a desegregation order.

KCMSD has admitted that it violated the Constitution by failing to remove the vestiges of the segregated school system. The district's only method for raising funds is the property tax. Although KCMSD's assessed property value per pupil is higher than that of any other school district in the area, *Jenkins I*, 807 F.2d at 686, its levy of $2.05 was the lowest in Jackson County. With these considerations and under the precedent of the Supreme Court in *Griffin*, *Swann*, and *Washington State*, and this court in *Liddell VII* and *United States v. Missouri*, the district court did not err or abuse its discretion in ordering that the KCMSD property tax levy be increased to allow the district to fund its share of the desegregation remedies. In doing so, it followed clear authority that restrictions and limitations of state law which impede the disestablishing of a dual school system may be set aside to remedy the constitutional violations.

The State and amici argue vigorously that the actions of the district court violate the right of the people to vote on an increase in their property taxes. Our holding

in *United States v. State of Missouri*, 515 F.2d at 1372-73, rejected that argument. We have recently addressed similar concerns in *Little Rock School Dist.*, where we stated that "[t]he right most prominently involved here is the right to a public education free of racial discrimination. That right 'may not be submitted to vote; [it] depend[s] on the outcome of no elections.'" 839 F.2d at 1303 (quoting *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943)). In *Haney v. County Bd. of Educ.*, 410 F.2d 920 (8th Cir. 1969), we specifically rejected the argument that orders in a desegregation case were limited by state law requiring consent of the electorate, stating that "'[a] citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be.'" 410 F.2d at 926 (quoting *Lucas v. Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713, 736-37 (1964)).

While we affirm the actions that the court has taken to this point, as we deal with an on-going remedy we think it appropriate to consider the procedures which the district court should use in the future. It is here that the arguments of the State and amici concerning principles of federal/state comity have their proper application, as we have expressed a desire to use minimally obtrusive methods to remedy constitutional violations. *See Liddell VII*, 731 F.2d at 1319-23; *United States v. Missouri*, 515 F.2d at 1372-73. State law currently requires the KCMSD board to submit its proposed levy to the collection authorities of Jackson County. Mo. Rev. Stat. § 164.011.2 (Supp. 1987). Deference should be given to the views of concerned state and local officials and to the working of local tax collection procedures to the extent that they appear compatible with the goals to be

achieved. *United States v. Missouri,* 515 F.2d at 1373. We believe a preferable method for future funding of KCMSD's obligation under the district court's desegregation orders is to authorize the school board to submit a proposed levy to the collection authorities adequate to fund its budget, including its share of the cost of the desegregation programs ordered by the district court. County and state authorities should then be enjoined from applying those Missouri constitutional and statutory limitations that would limit or reduce the levy below the amount submitted by the school board.

However, the levy must be subject to some reasonable limitation, taking into consideration rates in neighboring areas. *See United States v. Missouri,* 515 F.2d at 1372-73. There are several possible approaches for such a limitation. One would be to allow the highest levy approved by any district in Jackson County, which in this case is Lee's Summit with a levy of $4.77. Another approach would be to allow a combination of the highest levies for operating expenses and bonded indebtedness ever approved by KCMSD voters. A third approach would be to allow the average of the highest two or three levies in Jackson County. The levy must, of course, be sufficient to fund the necessary desegregation programs, and we believe that it is best to leave the selection of an appropriate limitation to the district court's discretion.[18]

---

18. We recognize that there may be some circumstances in which the district court could justifiably find that KCMSD did not have sufficient resources to fully fund the apportionment we have affirmed today of the desegregative costs, and if it so finds, we do not preclude the district court from placing the remainder of the burden on the State. *See* Part V, Section D, *supra,* and footnote 21. It is our intent that KCMSD contribute its share, subject to these considerations.

Permitting the school board to determine the amount of its levy (subject to reasonable limits) will give maximum consideration to the views of state and local officials and is least disruptive of existing state laws and procedures. The KCMSD board and county and state officials will be allowed to perform their functions as required by state law. In addition, the district court will be removed from the process of setting the levy, and limited solely to establishing the maximum limit and enjoining enforcement of those provisions of Missouri law that prevent KCMSD from raising the money to remedy the constitutional violations. Obviously, the parties can bring before the district court any objections or problems that may arise in implementing this plan.

Finally, we observe that the district court's October 27, 1987 order provided that the property tax increase would be reduced at the end of the 1991-92 fiscal year to generate only the amount necessary to retire the capital improvement bonds, approximately $14.9 million per year. In view of our reversal of the income tax surcharge (and unless new revenue sources are authorized), the increased property tax will be the only revenue source available to fund the desegregation expenses ordered by the district court. Accordingly, the ordered reduction of the property tax cannot be automatically implemented at the end of the 1991-92 fiscal year, and the district court must then evaluate further funding requirements.

One issue remains for determination, and that is Jackson County's appeal from the district court's January 7, 1988 order entering a permanent injunction against county officials to collect the property tax. On Octo-

ber 17, 1987, the district court entered a preliminary injunction against the county, holding that it was necessary to carry out the purpose of its lawful authority, and citing *Cooper v. Aaron,* 358 U.S. 1 (1958), and *Faubus v. United States,* 254 F.2d 797 (8th Cir.), *cert. denied,* 358 U.S. 829 (1958). The court also rejected the county's claim that the Tax Injunction Act, 28 U.S.C. § 1341 (1982), prevented it from entering such an order.

This court has already rejected the county's anti-injunction act argument in denying its petition for a writ of prohibition. *In re Jackson County,* 834 F.2d 150 (8th Cir. 1987). The county's argument that it has no connection with the underlying controversy because it is not a party and therefore should not be subject to the injunction is without merit. County officials are entrusted by law with the collection of taxes levied by local school districts. Here the district court entered an order that such taxes be increased and the county refused to adjust the 1987 school tax levy accordingly. The Supreme Court has made clear that "nonparties that interfere with the implementation of court orders establishing public rights may be enjoined." *Washington State,* 443 U.S. at 692 n.32. The county's arguments are utterly lacking in merit and the district court's order enjoining county officials to collect the property tax is affirmed.

C.

The income tax surcharge ordered by the district court involves substantially different considerations. As we have seen, the property tax is the established source of revenue for Missouri school districts, and the basic effect of the district court's order was to set aside levy limitations on this taxing authority. The order with

respect to the income tax surcharge is an entirely different matter. The district court defined the precise scope of the surcharge, its effective date, and set forth procedures for its collection by the State and delivery to KCMSD. *See Jenkins*, 672 F. Supp. at 412. We are satisfied that the district court invaded the province of the legislature in ordering this surcharge, and that the order is beyond the power of the district court as outlined in *Swann*, 402 U.S. at 45; *Griffin*, 377 U.S. at 233; *Liddell VII*, 731 F.2d at 1319-23; and *United States v. Missouri*, 515 F.2d at 1371-73.

Those decisions authorize the district court to set aside restrictions or limitations imposed by state law that impede the disestablishment of a dual school system, with appropriate deference to local tax collection procedures and the views of concerned state and local officials. The income tax surcharge fails on both counts. Rather than merely removing the levy limitation on an existing state or local taxing authority, the income tax surcharge restructures the State's scheme of school financing and creates an entirely new form of taxing authority. We believe the district court has exceeded its authority in ordering the collection of school district revenue from an entirely new source, with all funds delivered to one district for a specified purpose.[19] While this income tax surcharge was part of the legislative program KCMSD developed and submitted to the State General Assembly,[20]

---

19. Heretofore the State of Missouri has seen fit to place no limitations on its income tax revenue; it is payable into the general treasury of the State.

20. Legislation was introduced in the 1987 session of the House of Representatives, H.B. 757, to give school districts the authority to impose a sales tax up to 1/2 cent on individual

(Continued on following page)

none of the parties to this litigation seriously urged the district court to adopt it as part of a judicial remedy.

We accordingly reverse that part of the district court's order imposing the income tax surcharge. Any unexpended collections must be refunded and the district court is directed to take such action as it deems appropriate with respect to any further refunds. We caution that the constitutional violations must be remedied and the remedies fully funded. Any refund orders must be crafted recognizing this fundamental principle.

D.

In our earlier en banc opinion we made clear that the remedy ordered by the district court must be fully funded. *Jenkins I*, 807 F.2d at 686. Should the funds that KCMSD can provide for desegregation expenses under today's decision fall short, the remainder must be paid by the State, as the orders of the district court have imposed joint and several liability on the State and KCMSD.[21] *See* notes 3 & 4, *supra*. *See also Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 260 & n.8 (1979); *Watts v. Laurent*, 774 F.2d 168, 179 (7th Cir. 1985), *cert. denied*, 475 U.S. 1095 (1986).

Footnote continued—

earnings and business profits tax on residents and non-residents earning income or profits within the district and/or a surcharge of up to 25 percent on residents' state income tax, increasing the present tax rate from 6 percent to 7.5 percent. Further, any such tax increases could be approved by a simple majority. The KCMSD board proposed and supported this legislation. The legislation failed.

21. While we have rejected the argument urged by a number of the amici and adopted by the dissent that under this principle all costs should be borne by the State, the State does have an obligation to pay any required sums which are beyond the capacity of the school district.

The funding provisions that we have affirmed today will continue until further order by the district court, or until KCMSD is able to fund its share of the desegregation remedy or the legislature has made other sources of revenue available for this purpose.

VI.

The Jenkins class and KCMSD appeal from the district court's denial of the class' motion to have Kansas students included as participants in the KCMSD magnet plan. The district court declined to order KCMSD to educate residents of another state, with the State of Missouri paying the costs. The court found that inclusion of Kansas students would be unduly complex. We find no abuse of the district court's discretion in declining to order Missouri to pay to educate residents of another state. As the district court noted, this ruling does not preclude Kansas school districts from participating in a voluntary interdistrict transfer agreement with KCMSD.

VII.

Jackson County, Missouri and Icelean Clark, *et al.*, a group of individual and corporate taxpayers, appeal the district court's October 27, 1987 order denying their applications to intervene as of right.[22] The county filed a renewed motion to intervene on October 7, 1987 and the Clark group moved to intervene on September 25, 1987 to challenge the funding orders of the district court. The district court denied the motions as untimely.

---

22. The district court also denied the applications of the county and the Clark group for permissive intervention, but these rulings have not been appealed.

Rulings on the timeliness of applications to intervene are committed to the sound discretion of the district court and will not be disturbed on review absent an abuse of that discretion. *NAACP v. New York*, 413 U.S. 345, 365-66 (1973); *Arkansas Elec. Energy v. Middle South Energy, Inc.*, 772 F.2d 401, 403 (8th Cir. 1985). Timeliness is determined from all the circumstances, *NAACP v. New York*, 413 U.S. at 366, but three factors receive particular attention: "'how far the proceedings have gone when the movant seeks to intervene, prejudice which resultant delay might cause to other parties, and the reason for the delay,'" *Arkansas Elec. Energy*, 772 F.2d at 403 (quoting *Nevilles v. EEOC*, 511 F.2d 303, 305 (8th Cir. 1975) (per curiam) (citations omitted)).

Applying the analytical framework set forth in *Nevilles*, the district court ruled that the Clark group's September 25, 1987 motion and the county's October 7, 1987 motion were untimely because the court had already determined how KCMSD's portion of the desegregation plan would be funded in its September 15, 1987 order; the appellants had ample opportunity to file timely applications; and intervention at this late stage of the proceedings would unduly delay implementation of the remedy to which the members of the Jenkins class are entitled. Having carefully reviewed the record, we are satisfied that the district court did not err in so ruling.

The Clark group argues that their delay in seeking intervention should be excused because they did not have "actual or constructive notice of the District Court's ultimate taxation scheme" before entry of the September 15, 1987 order, and that dismissal of their motion to intervene in such circumstances constitutes a denial of due

process. While "absence of knowledge may, under certain circumstances, excuse delay in attempting to intervene," the burden of demonstrating lack of knowledge rests with the persons seeking intervention. *EEOC v. Westinghouse Elec. Corp.*, 675 F.2d 164, 165 (8th Cir. 1982) (per curiam); *Nevilles*, 511 F.2d at 305. The taxpayers have not met this burden. In its June 14, 1985 order, the district court discussed its power to raise taxes to fund the desegregation remedy and enjoined Missouri's "Proposition C" tax levy rollback. *Jenkins*, 639 F. Supp. at 44-45. The court again enjoined the rollback on August 25, 1985, and in its July 6, 1987 order the district court made clear its intention to fund KCMSD's portion of the remedy through either an earnings tax or state income tax surcharge. These orders were regularly reported by the local news media. Taken together, the orders were more than sufficient to inform the taxpayers of the status of the suit and put them on notice that their interests would be affected by the district court's funding orders. In particular, local property owners in the Clark group had already been affected by the orders enjoining the tax levy rollback. On this basis, the district court did not abuse its discretion in concluding that the taxpayers' motion to intervene was untimely. *Cf. NAACP v. New York*, 413 U.S. at 366-67; *EEOC v. Westinghouse*, 675 F.2d at 166; *Nevilles*, 511 F.2d at 306. As the taxpayers had fair notice of the action and were allowed to participate as amici curiae by the district court, their due process argument is also without merit.

Jackson County argues that its motion was timely because it originally sougth to intervene in an application filed on April 15, 1985, which "made the district court aware of its interest in any order dealing with tax in-

creases" well before the September 15, 1987 funding order. While the county's April 15, 1985 motion was filed with the district court, there is no proof that the motion was served on the parties, as Fed. R. Civ. P. 24(c) requires. The certificate of service accompanying the motion is not signed and none of the parties filed responses to the motion or otherwise indicated that they had received it. Thereafter, for a period of nearly two and one-half years, the county failed to take any action to intervene until the filing of its October 7, 1987 motion. During this period, as we have said, the district court issued a series of highly publicized orders which gave the county, like the taxpayers, ample notice of the course of the action and the fact that the county's interest as local property tax collector would be affected by the district court's funding orders. The county's two and one-half year delay in pursuing its motion to intervene was sufficient to justify the district court in treating the motion as having been filed on October 7, 1987 and ruling it untimely on that basis. *See McCarthy v. Kleindienst*, 741 F.2d 1406, 1415-16 (D.C. Cir. 1984).

The district court did not err in denying the motions of the Clark group and Jackson County to intervene.[23]

---

23. We are also satisfied that if the district court erred in denying intervention, the error was harmless. The district court granted members of the Clark group permission to participate as *amici*, and they have filed an *amicus* brief with this court challenging the funding orders and have participated in oral argument. The taxpayers have thus been granted the opportunity to challenge the funding orders, *see Arkansas Elec. Energy*, 772 F.2d at 404, and their challenge is based on questions of law which they can adequately present as *amici*, *see Blake v. Pallen*, 554 F.2d 947, 955 (9th Cir. 1977). The county has simply failed to overcome the presumption that its interests are adequately represented by the State. *See, e.g., Environmental Defense Fund v. Higginson*, 631 F.2d 738, 740 (D.C. Cir. 1979) (per curiam).

VIII.

We affirm the judgment of the district court with respect to the scope of the remedy. We also affirm its orders with respect to the property tax, but remand for further modifications as provided in this opinion. We reverse the judgment of the district court with respect to the income tax surcharge and stay any further collection. Finally, we affirm the order of the district court denying the motions of the Clark group and Jackson County to intervene.

LAY, Chief Judge, concurring and dissenting.

I generally concur in the opinion of the court. I take one major exception to the opinion. The district court found that the liability of the parties should be apportioned seventy-five percent for the state and twenty-five percent for the school district, but specifically held that liability was based upon a finding of joint and several tortfeasors.

The state appealed the apportionment of liability to this court. However, it has never appealed the district court's original judgment of joint and several liability. I do not fault counsel because it would be difficult absent a divisible injury under traditional legal principles to dispute the validity of such a holding.

This court's opinion has appropriately discussed how the state has "so narrowly circumscribe[d] KCMSD's duty to raise money" and that as a partial result therefrom it is a practical reality that the school district cannot fully contribute to the funding of the remedial program to meet constitutional compliance. Under the circumstances traditional legal principles apply. I would simply hold

that under a judgment of joint and several liability that upon failure of one tortfeasor to compy with the judgment because of financial inability to fund the remedial plan that any other tortfeasor may be liable for the whole. As the Supreme Court indicated in *Edmonds,* cited in the court's opinion, quoting from the Second Restatement of Torts:

> A tortfeasor is not relieved of liability for the entire harm he caused just because another's negligence was also a factor in effecting the injury. "Nor are the damages against him diminished." Restatement, [Second] *supra,* § 879, Comment a. Likewise, under traditional tort law, a plaintiff obtaining a judgment against more than one concurrent tortfeasor may satisfy it against any one of them. *Id.,* § 886. A concurrent tortfeasor generally may seek contribution from another, *id.,* § 886A, but he is not relieved from liability for the entire damages even when the nondefendant tortfeasor is immune from liability. *Id.,* § 880. These principles, of course, are inapplicable where the injury is divisible and the causation of each part can be separately assigned to each tortfeasor. *Id.,* §§ 433A (1) and 881.

Edmonds, 443 U.S. at 260-61 n.8.

I do not doubt the constitutional authority of the district court as approved in *Liddell VII* to exercise the remedial order necessary to bring about constitutional compliance. However, a judicial decree requiring increase in local levies on real estate and the imposition of a property tax should "be exercised only after exploration of every other fiscal alternative." *Liddell VII,* 731 F.2d at 1320. Thus, I do not feel that it was necessary

for the district court or feasible for this court to approve a property tax levy by KCMSD to meet its fiscal responsibility. Where other alternatives remain, it is the very essence of judicial restraint not to go beyond the relief necessary. The State of Missouri should therefore pay for any amount KCMSD is unable to contribute, failing existing means by KCMSD to raise the monies in order to effectuate constitutional compliance. The state may under existing law seek contributions from the KCMSD but this problem is between the parties and not for the court. I therefore would set aside the property tax levy ordered by the district court and use existing legal principles to effect constitutional compliance by holding the state liable for any deficiency KCMSD cannot contribute under the plan.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

(Amended October 24, 1988)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 86-1934/2537
87-1479/2299/2300/2565/2588/2589
88-1073-WM

Kalima Jenkins, etc., et al.,
Appellees,

v.

The State of Missouri, et al.,
Appellants.

Appeals from the United States District Court
for the Western District of Missouri.

There are now three petitions for rehearing en banc pending before the Court. It is hereby ordered that all petitions for rehearing en banc are denied.

Judge Pasco M. Bowman and Judge Roger L. Wollman would have granted the petitions. Judge Frank J. Magill did not participate.

The Court's mandate shall issue forthwith.

BOWMAN, Circuit Judge, joined by WOLLMAN, Circuit Judge, dissenting from the denial of rehearing en banc.

This is a case of exceptional importance. The remedies ordered go far beyond anything previously seen in a school desegregation case. The sheer immensity of the programs encompassed by the district court's order—the

large number of magnet schools and the quantity of capital renovations and new construction—are concededly without parallel in any other school district in the country. Similarly, in no other case has federal judicial power been used to impose a tax increase in order to provide funding for a desegregation remedy.

In addition, the case presents the overarching question of whether these court-ordered programs and court-ordered taxes are Constitutionally required in order to rectify the vestigial effects of legally mandated segregation (dead now for over thirty years) or instead represent an unsupportable exercise of judicial power in a legislative-style attempt to solve social problems that have their origins in other causes.

In over five years on the bench, I have not seen a case more deserving than this one of thoughtful consideration by the entire Court. The decision as it stands appears to arrogate to the federal judiciary vast powers that under the Tenth Amendment are reserved to the states or to the people. I therefore regret that a majority of the Court has voted to deny the petitions for rehearing en banc.

A True Copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

(Filed September 15, 1987)

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF MISSOURI
WESTERN DIVISION

No. 77-0420-CV-W-4

KALIMA JENKINS, et al.,
Plaintiffs,

vs.

STATE OF MISSOURI, et al.,
Defendants.

ORDER

On August 3-6, and 10-12, 1987, this Court conducted a hearing on KCMSD's motion for approval of its long-range capital improvement plan. After careful consideration, the Court approves the plan as modified in this order and orders funding of those projects scheduled for completion by the fall of 1990. The KCMSD also submitted for the Court's approval a student transportation plan for the long-range magnet school plan in 1987-88. The State objects to the plan and suggests that a hearing on the plan may be required. The Court will defer ruling on the motion at this time and will give the parties an opportunity to confer in an attempt to reach an agreement on a plan and if necessary to engage in discovery. If a hearing is necessary, it is hereby set to commence on December 14, 1987 at 9:00 a.m. In addition, KCMSD had

also moved the Court for funding of its projected operating and desegregation budget deficits through 1987-88. The Court will deny the specific relief requested by the KCMSD but will provide KCMSD with additional resources to fund the share of its known and projected costs of the desegregation plan through 1992. Finally, AFT 691's motion for alternate funding relief regarding KCMSD teacher salaries will be denied as a specific part of this remedial order as the Court is of the opinion that any salary increases should be left to the discretion of the school board.

Before addressing KCMSD's request for the Court's approval of its long-range capital improvement plan, a brief review of the capital improvements previously ordered by the Court is in order. In its original remedy order of June 14, 1985, the Court approved $37,000,000 to be applied toward the most critical capital improvement needs of the KCMSD and reserved judgment as to whether additional capital improvements would be needed. *Jenkins v. State of Missouri,* 639 F.Supp. 19, 41 (W.D. Mo. 1985). On June 16, 1986, the Court authorized an additional $12,877,330 in capital improvement expenditures for the six schools that became magnets in 1986-87 under the desegregation plan. *Jenkins,* 639 F.Supp. at 53. At that time the Court also ordered the KCMSD to submit a long-range capital improvement plan by January 5, 1987. *Id.*

Next, the Court approved $52,858,301 for capital improvements to eleven KCMSD schools that are to become magnets in the fall of 1987 under the court-ordered long-range magnet school plan. Order of November 12, 1986 at p. 5. Most recently, the Court approved $7,376,135 for the purchase and renovation of the Jewish Community

Center for use as a temporary performing arts middle school magnet in 1987-88. Order of April 29, 1987 at p. 3.

Turning to the matter presently before the Court, the KCMSD has submitted a $265,000,000 long-range capital improvement plan calling for the renovation and construction of approximately 72 schools and six other facilities through the fall of 1996. The Desegregation Monitoring Committee unanimously approved the plan on February 2, 1987. The plaintiffs and AFT 691 are generally in favor of KCMSD's plan. On the contrary, the State strongly opposes the plan and his submitted an alternate proposal calling for approximately $61,000,000 in renovations to existing KCMSD schools.

The present conditions of the KCMSD schools have been improved by the $37,000,000 in capital improvements undertaken pursuant to the Court's order of June 14, 1985 (testimony of Dr. R. Hunter, KCMSD Exh. 7). This work has primarily been on the exteriors of the school buildings and the surrounding playgrounds which has resulted in making them weatherproof and thus preventing further deterioration. The improved exterior appearance of these schools serves as an increased incentive for parents to enroll their children in the KCMSD. However, the overall condition of the KCMSD school buildings, particularly the interiors, is generally depressing and thus adversely affects the learning environment and continues to discourage parents who might otherwise enroll their children in the KCMSD (testimony of Dr. Hunter, C. Eppes, D. Osbourn, KCMSD Exh. 6).

The KCMSD facilities still have numerous health and safety hazards, educational environment hazards, functional impairments, and appearance impairments (testi-

mony of Dr. Hunter, KCMSD Exh. 6). The specific problems include: inadequate lighting; peeling paint and crumbling plaster on ceilings, walls and corridors; loose tiles, torn floor coverings; odors resulting from unventilated restrooms with rotted, corroded toilet fixtures; noisy classrooms due to lack of adequate accoustical treatment; lack of off street parking and bus loading for parents, teachers and students; lack of appropriate space for many cafeterias, libraries, and classrooms; faulty and antiquated heating and electrical systems; damaged and inoperable lockers; and inadequate fire safety systems (testimony of Dr. Hunter, C. Eppes, D. Osbourn, C. DesMoineaux, KCMSD Exh. 6). The conditions at Paseo High School are such that even the principal stated that he would not send his own child to that facility (testimony of R. Meadows).

Unquestionably, the deterioration of the KCMSD facilities is due to deferred maintenance by the KCMSD. However, as the Court found in its order of November 12, 1986, the State of Missouri by its constitutional violations and subsequent failure to affirmatively act to remove the vestiges of the dual school system certainly contributed to an atmosphere which prevented the KCMSD from raising the funds to maintain its schools. Order at p. 4. Furthermore, the Court has the responsibility of providing the victims of unlawful segregation with the educational facilities that they have been unconstitutionally denied. Therefore, a long-range capital improvement plan aimed at eliminating the substandard conditions present in KCMSD schools is properly a desegregation expense and is crucial to the overall success of the desegregation plan.

STATE'S CAPITAL IMPROVEMENT PROPOSAL

The State of Missouri has submitted a capital improvement plan to remedy what it perceives as the substandard conditions present in the KCMSD (State Exh. 8). The scope of the work contained in the State's plan is estimated to cost $61,074,565, approximately $200,000,000 less than the estimated cost of KCMSD's long-range capital improvement plan. For the following reasons, the Court finds that the State's proposal is unsatisfactory because it fails to remedy the substandard conditions in the KCMSD schools.

First, the State failed to consider the criteria of suburban comparability in evaluating the capital improvements to be made to the KCMSD schools. The Court in its order of June 14, 1985 specifically stated that capital improvements needed to bring KCMSD's facilities to a point comparable with the facilities in the neighboring suburban districts should be reviewed. Notwithstanding, Dr. Robert Bartman, Acting Commissioner of Education for the State of Missouri, instructed its architect, David Pearce, to only estimate the capital improvements necessary to eliminate health and safety hazards and to provide a good learning environment. Mr. Pearce testified that he compiled his estimates before he visted any suburban schools.

Specifically, the State's proposal does include funds for work needed on the electrical, mechanical, and ventilating systems to meet code requirements. However, the State's proposal does not provide sufficient funds for the updating of those systems to insure that the equipment does not suffer frequent breakdowns (testimony of D. Osbourn, C. DesMoineaux). In addition, the State pro-

poses to paint only those specific areas on walls and ceilings which are repaired (testimony of D. Pearce). With regard to floor coverings, the State proposes to replace only those tiles which are loose or damaged with a new tile of similar color and style. Likewise, only the sections of carpeting which are worn or torn would be replaced under the State's plan. This "patch and repair" approach proposed by the State would not achieve suburban comparability or the visual attractiveness sought by the Court as it would result in floor coverings with unsightly sections of mismatched carpeting and tile, and individual walls possessing different shades of paint.

The Court also questions whether the State has budgeted sufficient funds to perform the limited scope of work that it proposes. For example, the State budgeted only $5,000 for plastering at Paseo High School, unquestionably one of KCMSD's facilities most in need of renovation or reconstruction (testimony of Dr. Hunter, D. Pearce, D. Osbourn). KCMSD has budgeted approximately $211,000 for plastering and $230,000 for interior painting at the same institution.

Other deficiencies in the State's proposal are a lack of funds for accoustical treatment in classrooms, or for floor covering on the bare concrete floors found in many restrooms. Such covering would eliminate one of the primary causes of the stench in these toilet areas (testimony of D. Osbourn). Furthermore, the State's proposal only provides handicap access to one level of each KCMSD school, thereby restricting handicapped students' access to many of the facilities and special programs offered by the KCMSD (testimony of C. Eppes). The State does not provide any funds for locker repair despite testimony by its own architect that many of the lockers are damaged,

rusted, and missing doors. The State's plan does not include funding to reconfigure spaces within the KCMSD schools to provide adequate classrooms, library, cafeteria, and administrative areas.

The Court also notes that the State failed to estimate the cost necessary to provide magnet facilities needed to implement the long-range magnet school plan approved by the Court on November 12, 1986. The State argues that the broad contours of the magnet relief ordered are uncertain at best and suggests that the Court "reserve judgment on magnet related projects to a time when the scope of the magnet relief is more certain." State's Alternative Proposals Concerning Remaining Capital Improvements Funding for KCMSD, 6/3/87 pp. 29-30. The Court is certainly not surprised by the State's "wait and see" position but finds that such an approach would seriously damage the prospects of true desegregation in the KCMSD. The magnet plan is working as evidenced by the large number of applications for the magnet programs from students new to the KCMSD, and this Court is committed to its full implementation and will order the construction of the magnet facilities as part of the long-range capital improvement plan.

In conclusion, if the KCMSD schools underwent the limited renovation proposed by the State, the schools would continue to be unattractive and substandard, and would certainly serve as a deterrent to parents considering enrolling their children in KCMSD schools. Therefore, the Court rejects the State's plan and will next consider the long-range plan submitted by the KCMSD.

KCMSD'S LONG-RANGE CAPITAL IMPROVEMENT PLAN

The KCMSD has submitted for the Court's approval a long-range capital improvement plan which calls for the renovation of approximately 55 schools, the closure of 18 facilities, and the construction of 17 new schools by the fall of 1996. However, the KCMSD is presently seeking funding for only that portion of the plan which is scheduled for completion by the fall of 1990. KCMSD estimates the cost of these renovations and new facilities at $194,328,578.

The KCMSD employed three architectural firms to review all its school facilities and determine what work was necessary to renovate the buildings. These architects applied the criteria set forth by the Court in estimating the scope of the work required to remedy the deteriorating conditions that exist in the KCMSD as a result of unlawful segregation. The result of their evaluations are contained in the 1985 capital improvement study (KCMSD Exh. 23). These architects have amended these estimates to reflect work which has been completed, or will be completed pursuant to previous court orders and to reflect inflation (KCMSD Exh. 13, 14, 15 and 18). These renovations will eliminate the existing health and safety hazards identified by the Court and will correct the conditions which impede the level of comfort needed for the creation of a good learning environment. Equally important, these renovations proposed by the KCMSD, unlike those contained in the State's plan, will make the KCMSD visually attractive and reasonably comparable to the suburban Kansas City, Missouri schools (testimony of Dr. Hunter, D. Osbourn, C. Eppes). The remedy pro-

posed by the KCMSD is not a "patch and repair" approach, but rather a comprehensive plan to restore KCMSD school facilities to an environment in which children can learn. The Court finds that the capital improvements proposed by the KCMSD to eliminate health and safety hazards and to improve the visual attractiveness and comfort level of the KCMSD schools are necessary and that their costs are reasonable.

The remaining portions of KCMSD's long-range capital improvement plan primarily consist of the expansion of existing facilities and the construction of new facilities. Before addressing these specific proposals, the Court must first review the enrollment projections on which KCMSD's long-range capital improvement plan is based.

The Court acknowledges that it is very difficult to predict what the enrollment will be in the KCMSD over the next ten years. Student enrollment in the KCMSD declined from 70,756 students in 1970-71 to 39,078 students in 1980-81 (KCMSD Exh. 19). Enrollment has continued to decline since 1980-81 but at a lesser rate with signs of a leveling off. If approved, the KCMSD long-range capital improvement plan will produce capacity for 44,890 by 1995, with a capacity of 22,183 in the elementary schools, 10,499 in the middle schools, and 12,210 in the high schools (testimony of Dr. Hunter, KCMSD Exhs. 13, 14 and 15). This plan provides capacity for an enrollment greater than the enrollments projected by the State of Missouri and the KCMSD using the cohort survival method which is based on the presumption that past enrollment trends will continue (State Exh. 19, KCMSD Exh. 24 at Tab A, Appendix 1, Table 26). However, the Court finds that the long-range capital improvement

plan should not be based upon this presumption because it is very likely that enrollment in the KCMSD will increase due to the court-ordered upgrading of the regular school curriculum, the implementation of the long-range magnet school plan, and the improvements in capital facilities which have been completed and which will be made as a result of this order.

Because of the inadequacy of the cohort survival enrollment projection, Dr. Hunter, the educational expert who developed the long-range capital improvement plan, requested the Mid-America Regional Council to estimate the future enrollment of the KCMSD using a "capture rate" analysis. The capture rate is simply the percentage of students who live in the KCMSD who actually attend KCMSD schools. The study concluded that if the capture rate attained by the KCMSD in 1970 were reachieved in 1995, the student population would total 47,898 (testimony of Dr. Hunter, KCMSD Exh. 24 at Tab A, KCMSD Exh. 19). The Court finds that this estimate is more accurate than that calculated using the cohort survival method and yet KCMSD's plan is conservative because it does not provide for all the capacity necessary to accommodate a 1995 enrollment based on the 1970 capture rate. Therefore, the Court finds that KCMSD's long-range capital improvement plan is based upon appropriate enrollment projections and will now address the expansions and new construction proposed in the plan.

KCMSD's proposal provides funds for the expansion of certain classrooms, learning resource centers, cafeterias, art and music rooms, and administrative areas. Dr. Hunter testified that these facilities were deficient in size

and prepared specifications for standard facilities needed to house adequate educational programs (KCMSD Exhs. 2, 3 and 4). His recommendations are comparable to those made by the Missouri State Department of Elementary and Secondary Education (KCMSD Exh. 11). Furthermore, Dr. Hunter's recommendations were made only after he had visited each of the KCMSD schools and eleven of the suburban schools (testimony of Dr. Hunter). The Court finds that the expansion of these facilities is necessary to provide a good learning environment and that the costs of such expenditures are reasonable.

KCMSD's proposal also includes funding for the construction of specialized facilities needed for implementation of the long-range magnet school plan approved by the Court. Phale Hale, a magnet school expert who co-authored the long-range magnet school plan approved by the Court, devedoped the facilities requirements for the long-range magnet school plan (KCMSD Exh. 5). These improvements are in addition to the approximately $53,000,000 in capital improvements approved by the Court for the schools scheduled to become magnets in 1987. The magnet school plan is crucial to the success of the Court's total desegregation plan and the KCMSD cannot effectively implement the magnet programs without special facilities. The question before the Court is whether the improvements proposed are necessary to carry out the magnet programs approved by the Court.

One example is the Kansas City Technical Center, a four year vocational and technical magnet high school which is designed to prepare students upon graduation to either enter college, obtain entry level employment, or both. This magnet will offer programs ranging from

heating and air conditioning to cosmetology to robotics. Consequently, these programs require special equipment and spacious work areas in which to instruct the students. The estimated cost for Kansas City Tech is $13,278,603, which also includes funds for an expanded cafeteria, athletic facilities, and other facilities essential for the operation of a regular high school. The Court finds that all of the facilities proposed for the Kansas City Technical Center and all the special facilities requested for the other magnet programs are necessary to implement the long-range plan and that the estimated costs of these additional facilities are reasonable.

The long-range capital improvement plan also calls for the closure of eighteen KCMSD school facilities, 15 of which are currently operating as schools, and the construction of seventeen new schools, the last of which is a new middle school III scheduled for completion by the fall of 1993. The criteria used by the KCMSD to determine whether to renovate a school or build a new facility was that buildings with renovation costs of $45 per square foot or more should be replaced (testimony of Dr. Hunter). The estimated cost of construction of the new schools ranges from $61.80 per square foot for middle schools I and III to $95.70 per square foot for the new Attucks Elementary School. Both the architects for the KCMSD and the State of Missouri stated that buildings with renovations costs of more than 50% of the cost of new construction are candidates for replacement (estimony of D. Osbourn, D. Pearce).

The most expensive of the proposed new constructions is Paseo High School at an estimated cost of $13,991,375, excluding architectural fees and inflation (KCMSD Exh. 15). The renovation of the existing fa-

cility which includes the addition of special magnet facilities would cost an estimated $8,033,100 (KCMSD Exh. 15). The Court finds that it would be imprudent to renovate Paseo High School rather than build a new facility because both the architects for the KCMSD and the State stated that Paseo High School is near the end of its useful life (testimony of D. Osbourn, D. Pearce). In addition, it is essential to the success of the magnet school plan that Paseo High School be one of the most attractive magnet programs because it is located in an area which is considered difficult to desegrate (testimony of Dr. Hunter). Therefore, the Court approves the construction of a new Paseo High School and the sixteen other new facilities proposed in the long-range capital improvement plan. However, the Court approves funding of only those facilities scheduled for completion by the fall of 1990, and reserves final judgment on the remaining schools until a time when more current enrollment figures are available.

The Court also approves the closure of Attucks, Faxon, Gladstone, Greenwood, Holmes, Knots, Kumpf, Manchester, Pershing, Pitcher, Switser, Thatcher, Willard, Woodland, Linwood West, and Norman Elementary Schools. The Court will not establish closing dates at this time so that these schools may be used to house students while other facilities are being renovated or constructed under the long-range capital improvement plan.

KCMSD's plan also requests funding for the renovation of East Stadium, Southeast High Stadium and Arena, the Norman Administrative Center, Linwood, and Linwood West. The Court finds that these additional facilities are in need of renovation but finds that the 8% amount allotted for architectural and engineering fees, which is included in the total most of their renovation, is

excessive. The State's expert David Pearce testified that 6% is a customary architectural fee in school capital improvement projects. Therefore, the Court approves these renovations but in a lesser amount to reflect architectural fees of 6%. Similarly, the Court will only approve a 6% architectural fee for all the other renovations and new constructions approved by the Court as part of the long-range capital improvement plan.

In addition, the KCMSD did not present any evidence regarding its request for a furniture budget for schools to be renovated under the plan and for schools previously renovated. The Court simply cannot consider such requests without knowing the quantity and quality of the furniture that is presently available in the KCMSD.

The KCMSD has adjusted the estimated costs of its long-range capital improvement plan by 5% a year to reflect inflation. The Court finds that this percentage is reasonable and will apply it to the estimated costs of the plan as modified by this Court.

Finally, the KCMSD has also requested funding for a project management team which would oversee the implementation of the long-range capital improvement plan. The team, a joint venture of J.E. Dunn Construction Company and the Allied Companies, would utilize the architects, engineers and other specialists from these four firms in acting as KCMSD's agent in supervising the architects and contractors who are hired to perform the renovations and new construction set forth in the plan. In addition, the project management team will provide other professional services including project scheduling, cost control, quality control, and site selection (testimony of Robert Barrett, KCMSD Exh. 22). The KCMSD has

negotiated a contract, pending this Court's approval, with this project management team which provides that the team will receive compensation of $12,750,000 or 4% of the total capital improvements program expenditures for phases IV through VIII of the capital improvements program, whichever is less (KCMSD Exh. 22).

The Court finds that it is not feasible for the KCMSD to manage internally a program of the magnitude of the proposed long-range capital improvement plan. It is essential that the renovations and construction are completed on schedule and at costs within the budget approved by the Court. The Court finds that the project management team is necessary to effectively implement the plan and the Court is confident that the team will effect cost savings considerably more than the cost of the project management team. Accordingly, the Court approves the contract entered into between the KCMSD and the project management team (KCMSD Exh. 22) but approves the budget for the supervision and planning for only the first three years of the long-range capital improvement plan.

For the reasons set forth, the Court approves KCMSD's long-range capital improvement plan as modified in this order and orders the funding of those projects scheduled for completion by the fall of 1990 in accordance with Attachment A.

The plan approved by the Court does not include costs of acquiring or preparing sites for the new facilities. In addition, the Court acknowledges that the KCMSD will incur additional costs in relocating students while the approved capital improvements are completed. Accordingly, KCMSD is directed to submit these costs to the Court for approval and funding as soon as they become known.

The total amount of funding approved by the Court for those projects scheduled for completion by the fall of 1990 is $187,450,334. The State of Missouri and the KCMSD are jointly and severally liable for this amount with contribution between the two constitutional violators to be $93,725,167 each.

These capital improvements will have a service life of at least 30 to 50 years and the KCMSD will continue to benefit from them long after the hopeful success of the desegregation plan has been realized. For this reason the Court departs from the 3 to 1 apportionment generally set forth in previous remedial orders.

KCMSD'S 1987-88 MAGNET SCHOOL TRANSPORTATION PLAN

Also before the Court is KCMSD's motion for approval and funding of the 1987-88 incremental transportation costs attributable to the long-range magnet school plan ordered by the Court. KCMSD states that in 1986-87 it expended $1.4 Million to transport students to the three magnet programs at the Lincoln College Preparatory, the Southwest Cluster, and the Westport Community Applied Learning Magnet. KCMSD projects that the implementation of the 13 new magnet programs in 1987-88 will increase the total transportation costs for the magnet schools to $4,490,836. However, approximately $2.2 Million of this amount represents the cost that would have been incurred in operating traditional transportation routes at these schools even if there had been no magnet school program. Thus, KCMSD requests the Court to order the State to pay 75% of the remaining $2,294,075 cost of transportation required by the magnet program.

In response, the State requests that the plan be denied in its entirety or in the alternative that a hearing should be held at a future date to allow adequate discovery as to how and by whom the plan was developed and whether it is adequate and cost effective. As stated earlier, the parties should confer and see if they can reach an agreement on a plan. If needed, the parties may engage in discovery and if necessary a hearing will be held during the week of December 14, 1987. The KCMSD may implement the plan if it desires with the understanding that the Court has not approved the plan or ordered the State to fund any portion of the plan over and above the regular State aid under the standard formula.

KCMSD'S MOTION FOR FUNDING RELIEF

In its order of July 6, 1987, the Court deferred ruling on KCMSD's motion for funding relief until after the Court had ruled on the long-range capital improvement plan. The Court did so because it wanted an accurate estimate of not only KCMSD's deficit through fiscal year 1987-88, but also KCMSD's financial obligations under the overall desegregation plan through 1991-92.

Before setting forth the financial obligations of the KCMSD under the remedial plan, the Court must correct its order of July 6, 1987 which approved the year 3 desegregation budget. The Court, pursuant to the request of the KCMSD, included the 1987-88 implementation cost of the long-range magnet school plan in the 1987-88 desegregation budget. The total implementation cost for the 1987-88 magnets is $17,137,993, of which $13,946,729 was previously approved by the Court in its order of November 12, 1986. In that previous order, the Court found the State of Missouri and the KCMSD jointly and severally

liable for $8,908,406 of this amount, with the State solely liable for $5,038,323. This apportionment of liability for the $13,946,729 remains unchanged as will the Court's apportionment for the remaining implementation costs approved in the November 12, 1986 order. While the Court's apportionment for the KCMSD is more than 25% in year 1987-88 under the November 12, 1986 order, the percentage of liability for the implementation costs decreases to approximately 13% in 1991-92 under the plan. The KCMSD's total portion of the implementation costs and capital expenditures for the long-range magnet school plan approved in the November 12, 1986 order is approximately 25%, and thus is consistent with the Court's previous orders.

Therefore, in determining KCMSD's contribution to the year 3 desegregation budget, the Court mistakenly applied 25% to the entire 1987-88 implementation cost of the long-range magnets when the liability for $13,946,729 of that amount had already been apportioned. The 25% should only have been applied to the $3,191,264 in additional magnet base costs that the Court approved in its July 6, 1987 order. Therefore, the Court corrects page 12 of the order to reflect the following apportionment:

1987-88 Desegregation Budget

	Total	KCMSD'S Contribution	State's Contribution
Public Information	30,000.00	7,500.00	22,500.00
Desegregation Monitoring Office	– 0 –		
Program Evaluation	– 0 –		
Desegregation Monitoring Committee	256,228.00	64,057.00	192,171.00
Effective Schools	6,555,000.00	1,638,750.00	4,916,250.00
Reduction in Class Sizes Total	8,450,135.00	2,112,534.00	6,337,601.00
Summer School	1,295,764.00	323,941.00	971,823.00
Full Day Kindergarten	1,826,964.00	456,741.00	1,370,223.00
Before and After School Tutoring	233,759.00	58,440.00	175,319.00
Early Childhood Education	3,102,178.00	775,545.00	2,326,633.00
Long-Range Magnet School Plans	17,137,993.00	5,252,019.00	11,885,974.00
1986-87 Magnets	12,257,529.00	3,064,383.00	9,193,147.00
AAA Achievement	6,340,614.00	1,585,154.00	4,755,460.00
SWAS, DRP and STEPS	– 0 –		
Facilities Improvements (interest)	353,061.00	88,265.00	264,796.00
Totals	57,839,225.00	15,427,329.00	42,411,897.00

In calculating the financial obligations of the KCMSD under the Court's overall plan for which the district lacks funding, the Court finds that the KCMSD suffered a deficit of $1,092,365 in 1986-87 in implementing the long-range magnet school plan based on its obligation of $4,-158,136 and expenditures of $3,065,771. In addition, the Court approved a total of $60,234,436 in capital improvements for the long-range magnet plan in its orders of November 12, 1986 and April 29, 1987, with KCMSD's share set at $30,117,218. KCMSD has currently expended $3,027,413 for these improvements in 1986-87 but is without revenues to fund the balance of its share of these capital improvements, or $27,089,805.

For fiscal year 1987-88, KCMSD projects an operating budget of $121,342,253 and total revenues of $110,558,418, creating a deficit of $10,783,835. Included in the operating budget is approximately $7.15 Million for additional teachers and for salary increases for present teachers, $2,240,000 for facilities maintenance, and $869,189 for special education students. The AFT 691 has moved the Court to order a teacher's salary schedule larger than that included in the KCMSD 1987-88 operating budget.

The Court finds that the KCMSD has an obligation not only to eliminate the effects of unlawful segregation but also to insure that there is no diminution in the quality of its regular academic program. *Bradley v. Milliken*, 540 F.2d 229, 245 (6th Cir. 1976), *aff'd*, 433 U.S. 267 (1977), *citing Hart v. Community School of Brooklyn*, 383 F.Supp. 699, 741 (E.D. N.Y. 1974), *aff'd*, 512 F.2d 37 (2d Cir. 1975). Therefore, it is essential that the KCMSD have sufficient revenues to fund an operating budget which can provide quality education, including a high quality faculty. The Court is quite

aware that the KCMSD's teacher salary position, in comparison with the surrounding school districts, has deteriorated significantly because of KCMSD's failure to obtain passage of a tax levy to fund teacher salary raises. Consequently, KCMSD's ability to attract new teachers and retain present teachers has been restricted. While the revised salary schedule proposed by the KCMSD would not equal those in suburban districts, it will certainly make the KCMSD more attractive to new teachers and more pleasing to its present teachers. As stated at the beginning of the order, the Court will not order either of the salary proposals submitted by the KCMSD and AFT 691 because this decision properly lies within the discretion of the school board. However, the Court will provide KCMSD with revenues of $7.147 Million per fiscal year through 1991-92 to fund teacher salary increases, and revenues of $3,109,189 per year to fund the costs of facilities maintenance and special education students.

The KCMSD is also without resources to finance its portion of the 1987-88 desegregation budget, $15,427,329, which includes the 1987-88 implementation cost of the long-range magnet school plan. In addition, the KCMSD is without the funds to pay its proposed share of the 1987-88 transportation costs of the magnet plan, estimated by it to be $573,518. KCMSD is also obligated in 1987-88 to fund $6,069,801 in capital improvements pursuant to the long-range capital improvement plan approved by the Court. Finally, the Court estimates that site selection and student relocation costs associated with the long-range capital improvement plan will be approximately $4 Million per year, with KCMSD's portion to be $2 Million per year (affidavit of Roger Gaunt). In summation, the

KCMSD has financial obligations under the Court's overall desegregation plan for 1986-87 and 1987-88 of $62,509,653 for which it lacks resources to fund.

In fiscal year 1988-89, the KCMSD is obligated to fund an estimated $4,454,203 for implementation of the long-range magnet school plan and $27,399,873 in capital improvements pursuant to the long-range capital improvement plan. The Court projects that KCMSD's portion of the magnet school transportation costs for each of the next four fiscal years will be $573,518. The Court also projects that the KCMSD will have an operating budget deficit of $10,256,835 for fiscal years 1988-89 through 1991-92 due to expenditures needed for teacher salary increases, facilities maintenance, and special education students. In addition, the Court estimates that the 1988-89, 1989-90, 1990-91, and 1991-92 desegregation budgets at approximately $44,000,000 per fiscal year, excluding the long-range magnet costs approved by the Court in its November 12, 1986 order, because of the continuing cost of the remedial programs previously ordered by the Court. Therefore, the Court finds that the KCMSD will experience a deficit of approximately $11,000,000, or 25% of the desegregation budget, in each of those fiscal years. In summation, the Court projects a total deficit of $53,684,429 for the KCMSD for 1988-89.

Similarly in 1989-90, the Court projects that the KCMSD will experience a deficit of $5,027,721 in long-range magnet costs, $63,555,647 in capital improvement costs, $10,256,835 in operating budget, and $11,000,000 in desegregation budget, totaling $89,840,203. Using the same method of calculation, the projected deficits for years 1990-91, and 1991-92 are $42,543,837 and $33,823,793 respectively, bringing the total deficit to $282,401,915. A

summary of the KCMSD's known and projected obligations through 1991-92 under the Court's desegregation plan is set forth in Attachment B.

In its motion for funding relief, the KCMSD requested the Court to enjoin the rollback in the real estate tax levy otherwise required under Proposition C (R.S. Mo. §§ 163.050 and 164.013). The KCMSD also requested the Court to order the State of Missouri to advance to it funds for its desegregation and operating expenses that it is unable to fund. The KCMSD would then repay the State when resources were available.

The Court will not require the State of Missouri to fund any of KCMSD's financial obligations under the court-ordered desegregation programs. However, the United States Court of Appeals for the Eighth Circuit stated clearly that the desegregation remedy ordered by this Court shall be fully funded. *Jenkins v. State of Missouri*, 807 F.2d 657, 686 (8th Cir. 1986), and has discussed in detail the procedure the district court is to follow in achieving this goal. *Liddell v. State of Missouri*, 731 F.2d 1294, 1319-23 (8th Cir. 1984).

The record clearly shows that the KCMSD is unable with its present resources to raise revenues to fund its share of the costs assessed under the desegregation orders. The KCMSD has exhausted all available means of raising additional revenue, including presenting a bond issue in 1987 and tax levy increase proposals to the voters in four separate elections in 1986 and 1987. The KCMSD has not had a bond passage or a levy increase since 1969. As a result, its physical facilities have literally rotted.

Because of KCMSD's inability to raise additional funds under the present system, the Court encouraged the

Missouri General Assembly to "explore the possibility of enacting legislation that would permit a district involved in a desegregation plan more versatility than it presently has to raise funds with which to support the program." November 12, 1986 Order at p. 7. Such legislation was introduced but was received unfavorably and ultimately failed. In addition, the State of Missouri and the KCMSD have been unable to agree on an alternate method of raising KCMSD's share of the desegregation costs. Therefore, the Court has explored all the alternatives set forth by the Eighth Circuit and is left with no choice but to exercise its broad equitable powers and enter a judgment that will enable the KCMSD to raise its share of the cost of the plan and therefore insure that the constitutional violations committed by the KCMSD and the State of Missouri are cured.

The United States Court of Appeals for the Eighth Circuit has stated that such relief may only be granted after the Court has conducted an evidentiary hearing. *Liddell v. State of Missouri*, 731 F.2d 1294, 1323 (8th Cir. 1984). However, the plaintiffs, the KCMSD, and the State of Missouri have stated that they do not request an evidentiary hearing on this issue, and consent to the Court's entry of a judgment based on the record developed in this case.

A district court's broad equitable power to remedy the evils of segregation includes the power to order tax increases and bond issuances. *Liddell v. State of Missouri*, 731 F.2d at 1322. The United States Supreme Court has stated that a tax may be increased if "necessary to raise funds adequate to . . . operate and maintain without racial discrimination a public school system." *Griffin v. School*

Board of Prince Edward County, 377 U.S. 218, 233, 84 S.Ct. 1226, 12 L.Ed.2d 256 (1964).

A studied estimate of the additional revenues needed by the KCMSD to meet its share of the desegregation costs during the next five years reveals the sum of approximately $150,000,000 for capital improvements and $135,000,000 for other desegregation costs.

In its order of June 14, 1985, this Court stated that it was reluctant to take any action to increase taxes. The Court now affirms the statement made in its order of August 25, 1986 that it is not insensitive to the fact that those patrons of the KCMSD who voted in previous elections have refused to approve a tax levy increase and a bond issue. However, a majority has no right to deny others the constitutional guarantees to which they are entitled. This Court, having found that vestiges of unconstitutional discrimination still exist in the KCMSD, is not so callous as to accept the proposition that it is helpless to enforce a remedy to correct the past violations. Failure of the KCMSD to come forward with its share of funds to implement the remedial plan would certainly operate to hinder vindication of federal constitutional guarantees to which the school children in the KCMSD are entitled. This Court cannot shrink its sworn duty to uphold the Constitution of the United States (p. 4). The Court must weigh the constitutional rights of the taxpayers against the constitutional rights of plaintiff students in this case. The Court is of the opinion that the balance is clearly in favor of the students who are helpless without the aid of this Court.

The Court is of the firm conclusion that it has no alternative but to impose tax measures which will enable KCMSD to meet its share of the cost of the desegregation

plan. At the Court's request the parties have submitted estimates on revenues which would be generated through various tax measures.

The plaintiffs have moved the Court to require KCMSD to issue $144,175,000 in general obligation bonds, to add a $1.73 property tax levy in the KCMSD, and to impose a 1/2% sales tax effective January 1, 1989 within the KCMSD to permit KCMSD to fund its share of the costs of the desegregation orders.

During the hearing on the liability issue in this case there was an abundance of evidence that many residents of the KCMSD left the district and moved to the suburbs because of the district's efforts to integrate its schools but continue to be employed in the district. After careful consideration, the Court has determined that it would be equitable to involve these people in a plan to help defray the district's desegregation expense.

The Court will impose a 1.5% increase as a surcharge on the Missouri State Income Tax (raising the present rate on individuals from 6% to 7.5%) on residents and nonresidents of the KCMSD, including business associations, partnerships and corporations who earn salaries, wages, commissions and all other compensation and income subject to the Missouri State Income Tax for work done, services rendered and business or other activities conducted within the KCMSD. This surcharge shall become effective for all income earned after September 25, 1987. All employers and persons presently legally responsible for withholding the Missouri State Income Tax shall have the same responsibility for withholding the 1.5% increase. The State through its Department of Revenue shall collect the increased tax and remit it to

the KCMSD within thirty days after its receipt of same. KCMSD shall promptly prepare and publish a legal notice of this income tax increase (surcharge) giving notice to all employers within the district and to all persons and entities who receive an income for activities performed within the district.

Revenue generated by the income tax surcharge shall be used to retire capital improvement bonds which are herein authorized. It is anticipated that the surcharge will create sufficient revenue for the KCMSD to meet its portion of the cost of the capital improvement plan. The surcharge shall remain in effect until such time as the bonds are retired or until other provisions are adopted to insure their retirement.

The KCMSD presently has a tax levy of $2.05 per $100.00 assessed valuation. This is much less than the tax levy of any neighboring school district. In order to fund the other desegregation costs other than capital improvements for which it is obligated the district needs approximately $27,000,000 additional per year through the 1991-92 school year. A property tax increase of $1.95 per $100 assessed valuation would generate about $27,000,000 annually. Therefore the Court will order the property tax levy to be increased to $4.00 per $100 assessed valuation through the 1991-92 fiscal year.

The KCMSD is directed to issue capital improvement bonds in the total amount of $150,000,00 to be retired within 20 years from the date of isue. The board is authorized to issue credit enhanced leasehold revenue bonds and general obligation bonds in such proportion as the school board, in its discretion, determines to be most advantageous to the district.

In accordance with the foregoing memorandum, it is

ORDERED that the motion of the KCMSD for the approval of its capital improvement plan is approved as modified herein; and it is further

ORDERED that the motion of the KCMSD for approval of its student transportation plan for the long-range magnet school plan is deferred and if a hearing is necessary on the plan it is set to commence on Monday, December 14, 1987 at 9:00 a.m.; and it is further

ORDERED that the motion of AFT 691 for alternate funding relief regarding the salaries of the KCMSD teachers is denied; and it is further

ORDERED that the motion of KCMSD for funding relief is granted in part in that it is ordered that in order to fund the obligation of the KCMSD for the desegregation program, a surtax of 1.5% is added to the Missouri State Income Tax for all persons and entities receiving income for work done, services rendered, and income received from activities within the KCMSD and the tax levy for the KCMSD is raised to $4.00 per $100 assessed valuation; and it is further

ORDERED that said increased revenue shall be applied to satisfy the obligations of the KCMSD as set forth in this memorandum.

/s/ Russell G. Clark
Russell G. Clark, District Judge
United States District Court

Dated: September 15, 1987

(Filed October 27, 1987)

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF MISSOURI
WESTERN DIVISION

No. 77-0420-CV-W-4

KALIMA JENKINS, et al.,
Plaintiffs,

v.

THE STATE OF MISSOURI, et al.
Defendants.

ORDER

Presently before the Court are applications to intervene filed by Jackson County, Missouri, and Icelean Clark, *et al,* a group of individual and corporate taxpayers. After careful consideration, the Court will deny the taxpayers' motion for leave to intervene but will permit them to participate in *amici curiae.* The Court will deny the motion of Jackson County, Missouri for leave to intervene.

Applicants Icelean Clark, *et al.* seek leave to intervene as a matter of right, or in the alternative, permissive intervention, to challenge the Court's order of September 15, 1987 in which it increased taxes to fund KCMSD's obligation for the desegregation program. Pursuant to Rule 24, Federal Rules of Civil Procedure, intervention, whether as a matter of right or permissive,

is only appropriate if the application is timely. The determination of whether an application to intervene is timely is within the discretion of the trial court. *NAACP v. New York,* 413 U.S. 345, 366 (1973). The three factors usually considered in making this determination are: (1) how far the proceeding has gone when the movant seeks to intervene, (2) prejudice which resultant delay might cause to the other parties, and (3) the reason for the delay. *Nevilles v. EEOC,* 511 F.2d 303, 305 (8th Cir. 1975). For the following reasons, the Court finds that the taxpayers' motion to intervene is not timely.

First, the Court has already considered and passed on the issue of how KCMSD's portion of the desegregation plan shall be funded. Secondly, the taxpayers have had ample opportunity to file a timely application. In June, 1985 the Court discussed at length the ability of the Court to raise taxes to fund its desegregation remedy and actually enjoined the tax levy rollback required by §164.013, Mo.Rev.Stat. to raise revenues to fund the year one desegregation costs for which KCMSD was obligated. *Jenkins v. State of Missouri,* 639 F.Supp. 19, 44-45 (W.D. Mo. 1985). On August 25, 1985, the Court again enjoined the tax levy rollback to raise revenues to fund KCMSD's desegregation costs in year two of the desegregation plan. In its order dated July 6, 1987 the Court stated its intention "to generate KCMSD's portion of the desegregation funding through imposition of either an earnings tax or a state income tax surcharge." Order at p. 16.

For these reasons, the Court finds that the taxpayers are not entitled to intervene pursuant to Rule 24, Federal Rules of Civil Procedure. However, the Court will permit Icelean Clark, *et al.* to proceed in this case as *amici*

curiae. Penick v. Columbus Education Association, 574 F.2d 889, 890 (6th Cir. 1978).

Jackson County, Missouri has also moved the Court for leave to intervene to challenge the tax increases ordered by the Court. Jackson County is already before the Court on the issue of whether it is obligated to adjust and collect the property tax as ordered by the Court on September 15, 1987. Therefore, a motion to intervene on that issue is unnecessary. Regarding all other issues in this case, including the specific remedy ordered by the Court, Jackson County is not entitled to intervene pursuant to Rule 24, Federal Rules of Civil Procedure, because its renewed application is untimely for the same reasons set forth in the Court's analysis of the taxpayers' motion to intervene. Furthermore, the Court finds that intervention at this late stage in the proceedings would unduly delay the implementation of the remedy to which the plaintiffs are entitled.

Accordingly, it is hereby

ORDERED that the motion of Icelean Clark, *et al.* to intervene is denied; and it is further

ORDERED that Icelean Clark, *et al.* are permitted to proceed in the case as *amici curiae;* and it is further

ORDERED that the motion of Jackson County, Missouri to intervene is denied.

/s/ Russell G. Clark
Russell G. Clark
United States District Judge

Oct. 27, 1987

(Filed August 19, 1988)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-1934
No. 86-2537
No. 87-1749
No. 87-2299
No. 87-2300
No. 87-2588

Kalima Jenkins, by her friend, Kamau Agyei; Carolyn Dawson, by her next friend, Richard Dawson; Tufanza A. Byrd, by her next friend, Teresa Byrd; Derek A. Dydell, by his next friend, Maurice Dydell; Terrance Cason, by his next friend, Antoria Cason; Jonathan Wiggins, by his next friend, Rosemary Jacobs Love; Kirk Allan Ward, by his next friend, Mary Ward; Robert M. Hall, by his next friend, Denise Hall; Dwayne A. Turrentine, by his next friend, Shelia Turrentine; Gregory A. Pugh, by his next friend, Barbara Pugh; Cynthia Winters, by her next friend, David Winters; on behalf of themselves and all others similarly situated,

and

American Federation of Teachers,
Local 691,
Appellees,

v.

The State of Missouri, Honorable John Ashcroft, Governor of the State of Missouri, Wendell Bailey, Treasurer of the State of Missouri, Missouri State Board of Education,

Roseann Bentley,
Dan Blackwell,
Terry A. Bond, President,
Delmar A. Cobble,
Grover Gamm,
Jimmy Robertson,
Robert L. Welling,
Donald E. West,

Members of the Missouri State Board of Education,

Arthur L. Mallory, Commissioner of Education of the State of Missouri,
Appellants,

and

School District of Kansas City, Missouri and Claude C. Perkins, Superintendent thereof,
Appellees.

No. 87-2565

Kalima Jenkins, by her friend, Kamau Agyei, et al.,

and

American Federation of Teachers,
Local 691,
Appellees,

v.

The State of Missouri, et al.,

and

School District of Kansas City,
Missouri, et al.,
Appellees.

Icelean Clark; Bobby Anderton; Eleanor Graham; John C. Howard; Craig Martin; Gay D. Williams; Kansas City Mantel & Tile Co.; Coulas & Griffin Insurance Agency, Inc.; Sharon Dunham; Lindsay K. Kirk; Linda Frazier; Rick Feierabend; Linda Hollenbeck; James Hollenbeck; Susan Horseman; and Clifford M. Horseman,
Appellants.

No. 87-2589

Kalima Jenkins, by her friend, Kamau Agyei, et al.,

and

American Federation of Teachers,
Local 691,

v.

The State of Missouri, et al.,

and

School District of Kansas City,
Missouri, et al.,
Appellees.

Icelean Clark; Bobby Anderton; Eleanor Graham; John C. Howard; Craig Martin; Gay D. Williams; Kansas City Mantel & Tile Co.; Coulas & Griffin Insurance Agency, Inc.; Sharon Dunham; Lindsay K. Kirk; Linda Frazier; Rick Feierabend; Linda Hollenbeck; James Hollenbeck; Susan Horseman; and Clifford M. Horseman,
Jackson County, Missouri;
Appellants.

No. 87-2659

Kalima Jenkins, by her friend, Kamau Agyei, et al.,
Appellants,

and

American Federation of Teachers, Local 691,

v.

The State of Missouri, et al.,
Appellees,

and

School District of Kansas City, et al.,
Appellees.

No. 88-1073

Kalima Jenkins, by her friend, Kamau Agyei, et al.,
Appellees,

and

American Federation of Teachers, Local 691,

v.

The State of Missouri, et al.,

and

School District of Kansas City, Missouri, et al.,
Appellees,

Jackson County, Missouri; William Waris; Bernice J. Conley; Gary Panetheire; Beverly O. Ross; Michael Bendergast, their officials,
Appellants.

No. 88-1456

Kalima Jenkins, by her friend, Kamau Agyei, et al.,

and

American Federation of Teachers, Local 691,

v.

The State of Missouri, et al.,
Appellees,

and

School District of Kansas City, et al.,
Appellants.

Appeal from the United States District Court
for the Western District of Missouri.

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the district court is affirmed with respect to the scope of the remedy. We also affirm its order with respect to the property tax, but remand for further modifications as provided in this opinion. We reverse the judgment of the district court with respect to the income tax surcharge and stay any further collection. Finally, we affirm the order of the district court

denying the motions of the Clark group and Jackson County to intervene.

August 19, 1988

/s/ Robert D. St. Vrain

A True Copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.